In the Supreme Court of the United States.

OCTOBER TERM, 1910.

WILLIAM BROWN AND LEVI B. GRITTS, ON their own behalf, etc., appellants, *v.* THE UNITED STATES. — No. 331.

DAVID MUSKRAT AND J. HENRY DICK, ON their own behalf, etc., appellants, *v.* THE UNITED STATES. — No. 330.

APPEALS FROM THE COURT OF CLAIMS.

SUPPLEMENTARY BRIEF FOR THE UNITED STATES UPON THE POINT THAT THESE APPEALS SHOULD BE DISMISSED FOR WANT OF JURISDICTION.

In separate briefs heretofore filed in each of these appeals we have made the suggestion that there is no justiciable case or controversy here involved; that the special act authorizing these proceedings seeks merely to secure an opinion from the courts as to the validity of certain legislation of Congress; that no enforceable judgment is authorized and therefore no jurisdiction should be entertained by this court and the appeals should be dismissed.

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Inasmuch as both cases come here under the same special act of Congress and since they have been set down for hearing on the same day, it has seemed proper to present an additional brief confined solely to the jurisdictional question involved in both cases, and to cite herein the authorities which seem conclusively to sustain the Government's contention.

The special act of Congress authorizing the institution of these suits is found in a certain provision of the Indian appropriation bill of March 1, 1907, and reads as follows (34 Stat. 1028):

> That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens, having like interests in the property allotted under the act of July first, nineteen hundred and two, entitled "An act to provide for the allotment of lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," and David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September first, nineteen hundred and two, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any acts of Congress passed since the said act of July first, nineteen hundred and two, in so far as said acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and

funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, and provided for in the said act of July first, nineteen hundred and two.

And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal, by either party, to the Supreme Court of the United States, to hear, determine, and adjudicate each of said suits.

The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant, and, for the speedy disposition of the questions involved, preference shall be given to the same by said courts, and by the Attorney-General, who is hereby charged with the defense of said suits.

Upon the rendition of final judgment by the Court of Claims or the Supreme Court of the United States denying the validity of any portion of the said acts authorized to be brought into question, in either or both of said cases, the Court of Claims shall determine the amount to be paid the attorneys employed by the above-named parties in the prosecution thereof for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries under the said act of July first, nineteen hundred and two.

The above act constitutes the sole authority for these proceedings. The records in the two cases show that the petitions were filed below under the authority of the above act only, and the relief asked for in the prayers is, in conformity to the terms

of such act, simply that any legislation of Congress, passed after the allotment to the plaintiffs and before the commencement of these suits, which in any way attempts to restrict the alienation of said lands or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokee Indians be declared unconstitutional.

Upon this question of jurisdiction as applied to the two appeals herein we submit the following propositions:

1. No case is here presented which involves the exercise of judicial power by the Supreme Court within the meaning of the Constitution.

2. The procedure and relief must be limited to those provided in the special act under which these suits were brought, and this act authorizes merely an opinion of the court as to the validity of certain legislation of Congress, without the rendition of any enforceable judgment.

3. There is no real controversy here between the appellants and the United States, and no adverse parties, present or prospective. Therefore no case in a legal sense is presented for adjudication.

4. As to the Brown and Gritts case, No. 331, the questions are moot for the additional reason that since the commencement of the suit Congress, by the act of May 27, 1908, has passed another statute renewing and extending substantially the same restrictions upon alienation, and this later act will still be in force whatever may be the finding of the court as to the validity of other legislation.

A mere reading of the act under which these proceedings are brought will show that no "lawsuit" in the accepted meaning of that term was contemplated. Congress attempted merely to provide a method of securing from the Court of Claims and ultimately from this court an opinion as to the validity of certain acts affecting Indian lands and to furnish at public expense counsel on both sides to debate the question.

Whatever may be said of the power of Congress to impose this duty upon the Court of Claims, it is quite clear from the authorities that no jurisdiction in such a proceeding can be conferred upon the Supreme Court.

We shall discuss briefly, in their order, the propositions above set out.

FIRST.

No case is here presented which involves the exercise of judicial power by the Supreme Court within the meaning of the Constitution.

Section 2 of the judicial article of the Federal Constitution provides that "the judicial power shall extend to all cases, in law and equity, arising under the Constitution * * * ; to all cases affecting ambassadors, * * * ; to all cases of admiralty, * * * ; to controversies to which the United States shall be a party, * * * ; to controversies between two or more States," etc., and, further, that "in all cases affecting ambassadors * * * the Supreme Court shall have original jurisdiction."

And, finally, "in all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make."

The question as to what constitutes a case within the meaning of this section has been discussed in many opinions, and various definitions of the term have been given. Without following these discussions and definitions, it is sufficient for the present purpose to state that this court has uniformly held that no "case" arises in which its jurisdiction can be invoked unless at least the adjudication is final and conclusive between the parties and enforceable by execution or other process of the court.

The mere giving of an opinion has always been held not to constitute an exercise of judicial power (Thayer's Cases on Constitutional Law, vol. 1, p. 175), and whenever a proceeding in this court sought merely such an opinion jurisdiction has been denied.

The first instance in which this question was presented to the Supreme Court was in *Hayburn's case* (2 Dall., 409), where there was under consideration an act of Congress requiring the circuit courts of the United States to examine into the claims of officers, soldiers, and seamen of the Revolution and the pensions granted to invalids by that act, and to determine the amount of pay that would be equivalent to the disability incurred and to certify their opinion to the Secretary of War, who was authorized to report the finding to Congress. Every judge of the Supreme Court (excepting Thomas Johnson, of Maryland, who

appears not to have had the question before him) was of the opinion that the law was unconstitutional in that it was not the exercise of judicial power.

This opinion was followed in *United States* v. *Ferreira* (13 How., 40), in which the court considered a special act of 1849, authorizing the district judge of the United States for the Northern District of Florida to receive and adjudicate a claim of Ferreira and certain other persons in pursuance of a treaty of 1819, the several claims to be settled by the Treasury as in other cases under a previous act. Ferreira presented his claim to the district judge, who took testimony and rendered a decision as to the amount. The district attorney prayed an appeal to the Supreme Court. This court, speaking through Chief Justice Taney, declined to take jurisdiction, holding that the proceeding did not call for the exercise of judicial power.

In *Gordon* v. *United States* (Appendix to 117 U. S., p. 697) the opinion was prepared by Chief Justice Taney in 1864, but not printed until 1885. The court had under consideration an act of March 3, 1863, entitled "An act to amend an act to establish a court for the investigation of claims against the United States." This act provided for an appeal to the Supreme Court of the United States from any final judgment or decree rendered in any case by the Court of Claims wherein the amount in controversy exceeded $3,000, or where the judgment or decree would affect a class of cases or furnish a precedent for any action of any executive department. It

further provided that in case of a final judgment by the Court of Claims, or by the Supreme Court on appeal in favor of the claimant, the sum due should be paid out of any general appropriation made by law for the payment of private claims on presentation to the Secretary of the Treasury. Chief Justice Taney said (p. 698):

> Neither the Court of Claims nor the Supreme Court can do anything more than certify their opinion to the Secretary of the Treasury * * * neither court can by any process enforce its judgment; and whether it is paid or not does not depend on the decision of either court but upon the future action of the Secretary of the Treasury and of Congress.

After declaring that there was no objection to the Court of Claims being required to act in a nonjudicial or advisory capacity touching the validity of claims against the United States, the Chief Justice proceeds:

> But whether this court can be required or authorized to hear an appeal from such a tribunal, and give an opinion upon it without the power of pronouncing a judgment, and issuing the appropriate judicial process to carry it into effect, is a very different question and rests on principles altogether different. The Supreme Court does not owe its existence or its powers to the legislative department of the Government. It is created by the Constitution and represents one of the three great divisions of power in the Government of the United States, to each of which the Constitution has assigned its appropriate

> duties and powers and made each independent of the other in performing its appropriate functions. The power conferred on this court is exclusively judicial and it can not be required or authorized to exercise any other.

At page 702 it is said:

> And Congress can not extend the appellate power of this court beyond the limits prescribed by the Constitution * * *; nor can Congress authorize or require this court to express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties and process of execution awarded to carry it into effect.

Again, at page 702, the opinion proceeds:

> The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this court, in the exercise of its appellate jurisdiction; yet it is the whole power that the court is allowed to exercise under this act of Congress.

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Finally, in speaking of the duty of the court to maintain the separation and independence of judicial power, the Chief Justice says (p. 706):

> These cardinal principles of free government had not only been long established in England, but also in the United States from the time of their earliest colonization, and guided the American people in framing and adopting the present Constitution. And it is the duty of this court to maintain it unimpaired as far as it may have the power. And while it executes firmly all the judicial powers intrusted to it, the court will carefully abstain from exercising any power that is not strictly judicial in its character and which is not clearly confided to it by the Constitution.
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> For the reasons above stated we are of opinion that this appeal can not be sustained, and it is therefore dismissed for want of jurisdiction.

The cases of *Ferreira*, *Hayburn*, and *Gordon* v. *United States* have been cited and approved in later cases. Even in the decisions where special acts conferring jurisdiction on the courts to hear particular cases have been sustained because it was found that the acts in express terms gave full power to the court to issue all interlocutory and final orders and to enforce its judgments, the principles enunciated in the cases above cited have been fully recognized and approved. Such a case is *United States* v. *Union Pacific Railroad Company* (98 U. S., 569), where there was under consideration an act of Congress of March 3, 1873, providing that the Attorney-General might

cause a suit in equity to be instituted in the name of the United States against the Union Pacific Company and against all persons who had unlawfully received stock or property of said railroad or the profits or proceeds of contracts with said road, to compel an accounting and repayment. Though the bill, framed under the act, was held not sufficient to constitute a cause of action, the act itself was held to confer judicial power inasmuch as by its terms it was specifically provided that decrees might be entered and enforced against the parties defendant and that the court where the cause was pending might make such orders and decrees, etc., as might be necessary to carry into effect the purposes of the act, thus expressly authorizing final decrees to be carried into effect by execution or other process of the court.

Such a case also was *La Abra Silver Mining Company* v. *United States* (175 U. S., 423), where there was under consideration an act of Congress of 1892 by which the Attorney-General was directed to bring suits in the name of the United States in the Court of Claims against La Abra Company and all persons asserting an interest in the award of commissioners appointed under a certain treaty between the United States and Mexico to determine whether that award was obtained by fraud. In that act full jurisdiction was conferred on the Court of Claims to determine such suit, make all proper interlocutory and final decrees therein and to enforce the same by injunction or other final process. The court considered the scope of the specific provisions of the statute author-

izing all interlocutory and final decrees and enforcement of the same by injunction or other final process, and the further provision that the appeal to the Supreme Court should be under the rules or practice which govern appeals to that court, and came to the conclusion that the act authorized a conclusive determination as between the parties of the rights claimed by them, respectively, and therefore called for a proper exercise of judicial power.

The principles announced in the *Gordon* case and others following it are firmly established. To quote the language of Chief Justice Taney in *Gordon* v. *United States* (p. 704):

> Indeed no principle of constitutional law has been more firmly established or constantly adhered to than the one above stated—that is, that this court has no jurisdiction in any case where it can not render judgment in the legal sense of the term.

Especially should these principles apply where a proceeding is authorized to secure from this court merely an *opinion* as to the constitutionality of an act of Congress.

SECOND.

The procedure and relief must be limited to those provided in the special act under which these suits were brought and this act authorizes merely an opinion of the court as to the validity of certain legislation of Congress, without the rendition of any enforceable judgment.

The act of March 1, 1907, under which this appeal is prosecuted is a special act of Congress providing for a suit and regulating the procedure in such suit. The substance of its provisions is as follows: William Brown and Levi B. Gritts and others are authorized and empowered to institute their suits in the Court of Claims "to determine the validity of any acts of Congress" passed since a certain act of July 1, 1902, so far as said acts attempt to extend restrictions upon alienation, etc., of the lands of Cherokee citizens or to increase the number of persons entitled to share in the distribution of certain lands; the suits shall be brought before September 1, 1907, against the United States as defendant and shall be defended by the Attorney-General; upon the rendition of final judgment denying the validity of any portion of said acts the court shall determine the amount to be paid attorneys employed by the above-named persons and render judgment therefor.

In a proceeding such as this, where the jurisdiction which the court exercises is a special one created by an act of Congress which prescribes the mode of proceeding, the court is limited by the exact terms of the act and can not on any supposed analogy to

proceedings in other cases exercise any power or grant any relief beyond that which the act gives.

This rule is laid down in *United States* v. *Knight* (1 Black., 488). In this case Chief Justice Taney, speaking of an act conferring special jurisdiction on a court to determine rights of claimants under certain grants which had been made by the Mexican Government to private individuals, says (p. 489):

> But the jurisdiction which the court exercises in this case is a special one, created by act of Congress, and its mode of proceeding and powers are regulated and defined by the law; and it can not, under any supposed analogy to proceedings in chancery, exercise any power beyond that which the act or acts of Congress have given.

In *United States* v. *Ferreira* (13 How., 39), already cited, the court say, at page 49:

> It would seem, indeed, in this case, that the district judge acted under the erroneous opinion that he was exercising judicial power strictly speaking under the Constitution, and has given to these proceedings as much of the form of proceedings in a court of justice as was practicable. A petition in form is filed by the claimant; and the judge states in his opinion that the district attorney appeared for the United States, and argued the case, and prayed an appeal.

The court points out that the act required none of these things. In considering whether the act conferred judicial power the terms of the act were

to be looked at and not the fact that the proceeding below had been converted into a judicial one by the taking of steps not authorized by the act.

In *United States* v. *Union Pacific Railroad Co.* (98 U. S., 569), already referred to, the court in passing upon the question whether the suit there involved was judicial in its nature pointed out that the character of the proceeding must be limited by the terms of the act. Say the court at page 609:

> This consideration makes it clear that any bill brought by the Attorney-General under the fourth section of the act of 1873 *must be limited by the provisions of that act both as to the grievances on which it counts and the relief which it seeks.*

At page 608 the court say:

> We are of opinion that nothing other than what is found in the act, by express language or by fair implication, can be introduced into this suit as a foundation for the action of the court.

The court in that case, confining the bill to the terms of the act, reached the conclusion that the bill did not state a cause of action under general principles of equity jurisprudence. The charge made in the bill was that the board of directors of the railroad company had made contracts which were a fraud upon the company. The court said that this would be a proper subject of action in a proper case, but relief could not be granted in the case before it because the company was not a complainant. The persons who were defrauded were innocent stock-

holders, but they were not parties to the bill and the act did not permit them to be parties. No decree, therefore, could be entered in favor of the railroad company on account of these transactions. The court then proceeded to inquire whether the bill made a case in which the United States would be entitled to relief, and found that there was no ground for relief on behalf of the United States. Demurrer to the bill was therefore sustained.

The court, in the *Union Pacific* case, very carefully recognized and applied the rule that a proceeding under a special act must be confined to the terms of the act. In substance, the proposition in that case was this: The bill must be limited in the matter of parties, relief, etc., to the act which authorized it. Though the bill might be good if making allegations and parties not authorized to be made by the act, yet confining the bill to that permitted by the act it did not state a cause of action.

Nor will it do to say that some other suit might have been brought in which an appeal might properly have been allowed. In reference to a similar question, in the *Union Pacific* case, already cited (98 U. S., 569 at 619) the court say:

> We are not prepared to say that there are no trusts which the United States may not enforce in a court of equity against this company. When such a trust is shown, it will be time enough to recognize it. But we are of opinion that there is none set forth in this bill which, *under the act authorizing the present suit, can be enforced in the Circuit Court.*

In the language of Mr. Justice Brewer in *Pacific Whaling Co.* v. *United States* (187 U. S., 447 at 454):

> We are not called upon to decide what remedy by suit or action, if any, the petitioner may have. It is enough now to hold * * * that this novel proceeding was not a suit or action in which a final decree or judgment was entered from which the petitioner could take an appeal to this court.

Confining ourselves, therefore, to the terms of the act of 1907 in determining the character of the power authorized by it, it is seen that it does not provide for an ejectment proceeding or an action to quiet title; it does not require the persons named in the act to allege any interest in any property or to show that any act is about to be taken that will injure them in their property rights or otherwise; that they are about to alienate their land or have alienated it contrary to the provisions of the statute complained of; it does not authorize nor permit an injunction against any officers or other persons seeking to interfere with the rights of those bringing the suit. By its express terms it authorizes only an application to the Court of Claims "to determine the validity of any acts of Congress passed since said act of July 1, 1902." It mentions no judgment other than one determining the amount that shall be paid attorneys employed by the parties authorized to make the application. All that can be asked for or granted under the provisions of the act is an opinion that certain acts of Congress are valid or invalid. Such a proceeding is not an

action, suit, or case within the constitutional provision, Article III, section 2, in which was entered a final judgment or decree, an appeal from which could be authorized to be heard by this court.

THIRD.

There is no real controversy here between the appellants and the United States, and no adverse parties, present or prospective; therefore no case, in a legal sense, is presented for adjudication.

It will be observed that both these suits are against the United States. Brown and Gritts have sued the United States because Congress passed an act regulating the alienation of allotted Indian lands; and Muskrat and Dick have sued the United States because Congress passed an act regulating the distribution of unallotted Indian lands and of funds belonging to Indians.

It is certainly a new and unprecedented departure from familiar principles to suppose that where one claims an injury to some property right by a legislative enactment he may find his remedy, not in a suit against some officer who is attempting to enforce the law, or against some individual who sets up an adverse claim under it, but in a suit against the sovereignty whose legislative department passed the offending statute.

In these proceedings at bar Brown and Gritts do not allege that they have attempted to alienate or encumber their lands and that somebody is interfering; they do not ask any process of the court compelling or restraining some act which will determine and

enforce their rights with respect to the lands involved. They simply ask the court to say whether or not certain acts of Congress are valid. So in the *Muskrat and Dick* case, the appellants do not allege that the new persons admitted by the act of Congress to a share in the undistributed lands and funds of the Cherokees have taken, or are threatening to take, possession of such lands or funds, or that any officer of the Government is about to put them into such possession; nor do they make any claim whatever which, even if admitted, could form the basis of a judgment. They also simply ask the court to say whether or not a certain act of Congress is valid.

There is no dispute, in a legal sense, between these appellants and the United States. There is no conflict of right or title, nor adverse claim of any character, between the plaintiffs and the defendant in these proceedings. The cases can not be likened to a suit to quiet title, for the United States is not asserting any adverse title to the lands. It has no property or pecuniary interest whatever in the question presented.

It thus appears that there is here shown neither of the essentials to make a case justiciable in the courts. There is neither a present controversy nor adverse parties.

It may well be that there are appropriate suits in which the constitutionality of these acts of Congress may be tested, but such suits must proceed against those who assert some property right under the acts adverse to the appellants, or against some

one who is threatening to enforce the acts to the immediate and irreparable injury of the appellants. But these suits against the United States settle nothing whatever, and no judgment, even if authorized in the present case, could avoid another examination of the same questions whenever a real controversy between real parties in interest arises.

It would seem unnecessary to argue that where property rights are affected by regulations of law, adverse claims thereunder must be fought out between the adverse claimants and not in suits against the Government which passed the law. If a state legislature should enact a statute imposing new restrictions upon the alienation of lands by infants, or requiring additional witnesses to deeds or wills, or changing the rules as to descent and distribution of real and personal property, certainly no suit would lie against the State to test the validity of such acts, and no court would entertain such a suit even if the plaintiff were empowered by the legislature to bring it. So if a state legislature should pass an act expropriating the land of "A" and attempting to give it to "B," the suit that would result would be between "A" and "B" and not between "A" and the State.

Yet in these proceedings at bar the United States, which is asserting no claim whatever to the lands in controversy; which has no pecuniary interest in the matter; which is not charged, either as a corporate entity or by means of some of its officers, with attempting or threatening to enforce any of the acts

complained of, is sued, and the only basis for the suit is that Congress passed certain acts affecting Indian lands and then authorized the plaintiffs to bring an action against the United States to test their validity.

We submit that this does not present any case, within the meaning of the Constitution, of which jurisdiction can be taken in this court.

There are two decisions of this court which clearly support our contention upon this point. The first of these is *Williams* v. *Hagood* (98 U. S., 72), where a suit was brought by the holder of certain certificates of indebtedness issued by the State of South Carolina, and it was sought to compel certain officers of that State to levy taxes for the redemption of said certificates and to accept them in payment of taxes, in accordance with certain statutes of the State upon the faith of which the certificates had been accepted by the holder, and which statutes had been subsequently repealed to his injury. An appeal to this court from a judgment adverse to the certificate holder in the court below was dismissed on the ground that the appellant had not averred that the state and local officers had neglected or refused to perform their duty; that any demand had been made upon them or any tender of the payment of taxes with the certificates of indebtedness. The object of the suit, said Mr. Justice Strong—

> is plainly to obtain from this court a declaration that the legislative acts of October 22 and December 22, 1873, are unconstitutional, because impairing the obligation of the

> contract made by the act of 1872, and the certificates thereby authorized and thereunder issued, and this without any averment that the complainant will be injured by them. The question presented to the court is, therefore, merely an abstract one; such a one as no court can be called upon to decide, etc. (p. 75).

The second case is that of the *Chicago and Grand Trunk Railway Company* v. *Wellman* (143 U. S., 339). There the court had under consideration a friendly suit, brought like these at bar, to determine the validity of certain acts of the legislature without the intervention of any real controversy. Mr. Justice Brewer announces a general principle which is especially applicable in the present instance. At page 345 he says:

> Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.

The principles stated in the preceding cases were recognized in a striking manner by this court in *Minnesota* v. *Hitchcock*, 185 U. S., 373, 387, 388. In that case the State of Minnesota brought suit in this court to enjoin the Secretary of the Interior from selling any sections 16 and 36 in an Indian reservation located within the State of Minnesota. The State contended that those sections had been granted to it as school lands. The Secretary of the Interior, on behalf of the United States, contended that previous to the grant under which the State claimed the sections had been reserved for an Indian reservation, and thereby separated from the public domain of the United States, and not intended to pass to the State by virtue of the alleged grant. The suit was brought under the act of March 2, 1901, c. 808, 31 Stat., 950, which provides in part as follows:

> That in any suit * * * instituted in the Supreme Court of the United States to determine the right of a State to what are commonly known as school lands within any Indian reservation * * * or in the disposition thereof by the United States, the right of such State may be fully tested and determined without making the Indian tribe * * * a party to the suit if the Secretary of the Interior is made a party thereto.

Although the defendant did not question the jurisdiction of the court, this court considered at length the question of whether the suit, authorized and brought under said act, presented a real controversy

between the United States and the State of Minnesota. It held that it did upon the following grounds: The legal title to the lands was in the United States; the officer named as defendant had no interest in the lands, or the proceeds thereof; the United States was proposing to sell them. The suit sought to restrain the United States from such sale and to divest the Government of its title and vest it in the State. In a word, the United States was the real party that would be affected by the judgment and against which it in fact would operate.

In answer to the contention that the United States had no substantial interest in the lands because it held the legal title under a contract with the Indians and in trust for their benefit, this court said:

> This is undoubtedly true, *and if the case stood alone upon the construction of the treaty between the United States and the Indians there might be substantial force in this suggestion.* [Our italics.] But Congress has, for the Government, assumed a personal responsibility.
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> Can the court say that the United States may not assume such responsibility; may not waive all objections on account of the mere matter of trusteeship, and stand in court as the responsible owner, against whom all litigation may be directed?
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> * * * * *

FOURTH.

As to the Brown and Gritts case, No. 331, the questions are moot for the additional reason that since the commencement of the suit Congress, by act of May 27, 1908, has passed another statute renewing and extending substantially the same restrictions upon alienation, and this later act will still be in force whatever may be the finding of the court as to the validity of other legislation.

It will be noticed that with respect to both these appeals the court is asked to consider only certain acts of Congress, to wit, those passed after July 1, 1902, and before the commencement of this suit, which in any way attempt to extend restrictions on the alienation of the lands involved or increase the number of those who shall share in unallotted lands and undistributed funds. That is to say, there is not here presented, even as between these appellants and the United States, any question which will finally determine the rights or claims between them as to the alienation or distribution of their lands. In other words, the question presented is not whether the Indians hold their lands free from restraint upon alienation or their undistributed shares free from the claims of other parties, but what effect upon these rights results from *particular acts of Congress*. To put it another way: There is no final adjudication authorized or possible between these Indians and the United States with respect to the title, interest, or dominion over these lands, and no judgment can be rendered fixing such rights or enforcing them.

But with respect to the suit of Brown and Gritts, No. 331, the question is moot for the further reason that Congress, by the act of May 27, 1908, *after the passage of the act authorizing the suit, and after the suit was begun*, passed another statute imposing substantially the same restrictions upon the alienation of the lands involved, and the later statute will now prevent alienation, whatever the opinion of the court may be as to earlier legislation, for the constitutionality of the later act is not here questioned.

The act of May 27, 1908, is set forth in full in the principal brief on behalf of the Government. (See brief for the United States in *William Brown and Levi B. Gritts* v. *United States*, No. 331, October term, 1910, pages 15, 16, 17, and 18.) It provides:

> That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows:

Then follow various restrictions, the pertinent ones being in substance that full-blood Cherokee Indians (to which class Brown and Gritts belong) shall not alienate any lands, whether homesteads or surplus lands (heretofore or hereafter allotted to them) until on or after April 26, 1931, except with the approval of the Secretary of the Interior, nor alienate any lands inherited by them except with the approval of a court having jurisdiction of the settlement of the estate of the deceased allottee.

There are also certain provisions with respect to the leasing of lands, and then followed other matters not now pertinent. The scope and purpose of the act of May 27, 1908, are clearly to fix the present status of all lands heretofore or hereafter allotted to members of the Five Civilized Tribes, including the lands of appellants, with respect to any and every manner of alienation or incumbrance, and to modify or repeal any and all previous acts inconsistent with the new declaration of Congress. This act of 1908 is not attacked and can not be attacked in the present proceeding.

It follows, therefore, that the validity or invalidity of previous acts of Congress extending restrictions upon the alienation of any of these lands is now a moot question.

The principle is well settled that where an event happens which makes the question before the court at the time it is ready to be heard a moot question, the proceedings should be dismissed. (*Mills* v. *Green*, 159 U. S., 651; *California* v. *R. R.*, 149 U. S., 308; *San Mateo County* v. *R. R. Co.*, 116 U. S., 138; *Little* v. *Bowers*, 134 U. S., 547; *Board* v. *Glover*, 160 U. S., 170.)

In the case of *Pennsylvania* v. *Bridge Co.* (18 How., 421) an injunction was secured against the erection of a bridge as an obstruction to navigation. Subsequently Congress passed an act authorizing the bridge as constructed. On application to the Supreme Court the injunction was dismissed on the ground that the question was moot whether the bridge had been, before the act of Congress, an obstruction.

In *Linn* v. *Hewitt* (55 Ia., 505, approved in *Mills* v. *Green*, 159 U. S., 656) it was held that an order refusing an injunction against building a railroad along a highway, though erroneous when made, should not have been reversed when the legislature, pending the appeal, had authorized the act complained of.

In *Dinsmore* v. *Southern Express Company* (183 U. S., 115) this court had under consideration an action brought by owners of certain stock in an express company seeking a decree that would prevent an application by that corporation of any of its moneys to meet the requirement of the war-revenue act of 1898 with relation to adhesive stamps to be placed upon bills of lading, etc. The war-revenue act required that every railroad, express company, etc., should issue a bill of lading and attach a stamp of the value of 1 cent. A complaint was made to the Railroad Commission of Georgia that defendant express company was requiring shippers to supply the requisite stamps for such bills of lading, and the Commission ordered the stamp to be supplied by the express company and not by the shippers. Action was then brought in the United States Circuit Court to declare the order of the Railroad Commission void. The Circuit Court held the order void and on appeal to the Circuit Court of Appeals the decree was reversed and the case dismissed. The case was brought to the Supreme Court upon writ of certiorari. After submission of the case to the Supreme Court that part of the war-revenue act of 1898 relating to stamps to be attached to bills of lading, etc., was amended in such

a way as to exclude express companies from the requirement. The Supreme Court say, page 119:

> This change in the law renders it unnecessary to consider any of the important questions determined in the Circuit Court and Circuit Court of Appeals under the act of 1898. The object of this suit was to prevent the enforcement of the order of the Railroad Commission based upon its construction of that act. But whatever might be now held as to the meaning and scope of the act of 1898 as applied to express companies, the amendatory statute of 1901, in declaring what companies, corporations and persons shall attach the required stamp to bills of lading, manifests and receipts for goods or other property to be transported, distinctly excludes express companies. So that no actual controversy now remains or can arise between the parties.
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> "It is in general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied."

With reference to the case at bar, therefore, the act of May 27, 1908, having fixed the status of Indian lands as to restraints upon alienations, etc., the validity of previous acts extending such restrictions is a moot question, and the present appeal should be dismissed.

There is another aspect in which the act of May 27 1908, must be regarded that is important here. Notwithstanding the provisions of the act of March 1, 1907, providing that Brown and Gritts might bring suit to determine the validity of certain prior acts of Congress extending restrictions upon the alienation of Indian lands, Congress, by the act of 1908, settled definitely the status of such Indian lands so far as restrictions upon alienation were concerned, and *there was no authorization of any suit to determine the validity of the latter act.* Congress must be regarded as having intended, therefore, by the act of 1908 to settle finally the status of the lands allotted to the allottees of the Five Civilized Tribes as regards restrictions upon alienation, and to have this act supersede all prior acts affecting restrictions upon alienation not already removed. It follows from this that Congress has, in effect, withdrawn permission to bring this suit, which concerns only acts now superseded.

By the act of May 27, 1908, Congress expressly amended one section of the act brought into question in the *Brown and Gritts* case, to wit, the act of April 26, 1906. Congress further provided that the act of 1908 should not be construed to impose restrictions that had already been removed from lands under prior acts, and as to all other matters relating to restrictions upon alienation the new act makes full provision. In other words, Congress by the act of 1908 completely disposed of the entire situation; determined what parts of previous acts should remain;

what parts should be amended; what effect alienations already completed should have, and what should be the status of all the Indian lands involved. So it appears that Congress has itself made the *Brown and Gritts* case now before the court a moot case, and for this reason also the appeal should be dismissed.

We therefore submit that these two appeals now before the court should be dismissed, because as to each the proceeding in the Court of Claims did not constitute a case from which an appeal could, under the Constitution, be given to this court.

As to the *Brown and Gritts* case, No. 331, the appeal should be dismissed for the further reason that because of the act of May 27, 1908, there is now presented to the court only a moot question.

WADE H. ELLIS,
HENRY E. COLTON,
Special Assistants to the Attorney-General.

NOVEMBER, 1910.

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and the suits proceed along the line of this amendment.

Mr. McCUMBER: Will the Senator state wherein the amendment, which he designates as the McCumber amendment, will be questioned in this proceeding? How can it possibly arise in the three cases referred to?

Mr. CLARK of Wyoming: It arises in the Laura Secondine case, as I remember it, by reason of the fact that she is upon the full-blood roll. There are two questions in her case. The petition in the case is directed against the McCumber amendment, by which her right to alienate was thrown over twenty-five years. Just the particular point in each of the three cases I am unable to state. It is all in the memorial which was presented by the Senator from Kansas (Mr. Long). All of the cases go to the particular point we have had so much difficulty about, and which I should be glad to have settled. (Cong. Rec., 59th Cong., 2d sess., Vol. 41, p. 2454.)

The two questions for the court to determine, which are referred to in the statement of Senator Clark, are the power of Congress to impose further restrictions upon alienation, incumbrance, or leasing of allotments involved in this case, and the power of Congress to allow children born of Cherokee citizens after September 1, 1902, to share in the allotment of Cherokee tribal lands involved in the case of *Muskrat and Dick vs. The United States* (44 C. Cls., 137), set down for hearing in the Court of Claims with this case. All of which provisions at the time of the institution of these two suits were contained in the act of April 26, 1906, and the act of June 21, 1906 (34 Stat., 325), though Congress appears to have anticipated the decision of this case by enacting legislation still further restricting alienation and leasing.

After the suit had been brought the petitioners attacked the validity of the act of March 11, 1904, *supra*,

"An act authorizing the Secretary of the Interior to grant rights of way for pipe lines through Indian lands," upon the ground that the damages arising from the rights of way through allotted lands, instead of being paid to the allottee, were being diverted and paid into the tribal funds (original petition, Rec., pp. 6 and 7). This contention of the petitioners was based upon a mistake of fact, as the damages arising from rights of way through the lands of allottees were paid to such allottees, and only where the rights of way ran through unallotted lands were the damages paid into the tribal fund (Rec., p. 24).

However, had the facts been as believed by the petitioners, still the court would have had no jurisdiction to consider the validity of this act, because it does not "attempt to increase or extend the restrictions upon alienation, incumbrance, or the right to lease the allotments of lands of Cherokee citizens."

The appellants have also in an amended petition, filed March 26, 1908 (Rec., pp. 13 and 14), attacked an item of the Indian appropriation act of March 1, 1907, *supra* (the same act containing the jurisdictional clause), providing for certain expenses in leasing the lands of full-blood Indians and the sale of inherited and other lands. The court has no authority to consider the validity of this act, first, because it does not "attempt to increase or extend the restrictions upon alienation, incumbrance, or the right to lease the allotments of lands of Cherokee citizens"; second, because it is a provision of the same act which contains the jurisdictional act, and it is hardly possible that Congress intended to confer jurisdiction upon the court to construe this act also; and, third, because the appropriation provided by the act was reimbursed and the regulations under which the expenses were collected were revoked by the Secretary of the Interior prior to the filing of the petitioners' amended petition on March 26, 1908, complaining of the provision in question (Rec., pp. 28 and 29). The fact that the amended

petition was not filed prior to September 1, 1907, *as required by the jurisdictional act,* is rather strong evidence that the petitioners did not themselves believe that the court had any right to construe this clause, but they were only catching at straws in an effort to save something from the wreck. All of which agrees quite well with the statement of the chairman of the Judiciary Committee as to the questions involved at the time the matter was referred to the court.

The Court of Claims declined to consider the act of March 1, 1907, *supra,* for the following reasons:

> By an amended petition filed March 26, 1908, long after the time fixed by the jurisdictional act for the commencement of suit, the claimants attack a provision in said jurisdictional act (March 1, 1907, p. 1025), charging the lands allotted to full-blood Cherokees with clerical expenses connected with the leasing of such allotments for mineral and other purposes; but, as that provision clearly is not covered by the language of the jurisdictional act respecting the extension of the restrictions upon alienation, incumbrance, or the right to lease allotments, we will not consider it further than to say that the money so used was reimbursed before the filing of the amended petition herein, and it has since been omitted in the appropriation act of April 30, 1908 (35 Stat., L., ——); and besides it can hardly be said that Congress intended the court to consider the validity of the provision in the same act that contained the jurisdictional clause.

Nor is section 22 of the act of April 26, 1906, providing that the sale and conveyance of the inherited lands of Cherokee full-bloods should be subject to the approval of the Secretary of the Interior, before the court for construction in this case, because neither of the petitioners who have instituted this suit have any such interest as would entitle them,

or either of them, to have this question adjudicated. William Brown sues as the sole heir of the fee simple estate of his deceased son, Charles Brown, who died intestate, leaving surviving him a half-sister on his mother's side, and his father, who was legally entitled to only a life estate in the allotment of his son under chapter 49, section 2531, Mansfield's Digest of the Statutes of Arkansas, 1884, in force in the Indian Territory at the date of the death of the said Charles Brown, which provides:

> In cases where the intestate shall die without descendants, if the estate came by the father, then it shall descend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be *a new acquisition it shall ascend to the father for his lifetime,* and then descend in remainder to the collateral kindred of the intestate in the manner provided in this act; and, in default of a father, then to the mother, for her lifetime; then to descend to the collateral heirs as before provided.

The land allotted to Charles Brown, son of William Brown, was not an estate of inheritance, but *a new acquisition*, and his father took only a life estate therein. (*Kelly Heirs vs. McGuire*, 15 Ark., 555; 31 Ark., 103.)

In addition to the fact that the petitioner, William Brown, has no such interest in the estate of his deceased son, Charles Brown, as would give him the right to test the validity of section 22 of the act of April 26, 1906, the provision to which objection has been made has been repealed by section 9 of the act of May 27, 1908, *supra.*

However, an identical provision was sustained in the case of the *United States vs. Thurston Co., Nebr., et al.* (143 Fed. R., 287), where, after the delivery of patents conveying allotments, Congress, by a subsequent act, had, as in this case, provided that the heirs of deceased allottees might sell

and convey inherited lands, subject to the supervision of the Secretary of the Interior. The provision considered in that case was in the following language:

> But all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon alienation had been issued to the allottee.

Therefore, after having eliminated all of the questions raised, which are not properly before the court in this case, there remains for construction two sections, 19 and 20, of the act of April 26, 1906.

Cherokee Title Similar to Other Indian Titles.

The term "Indian country" has always been used to designate the territory within the limits of the United States to which the Indian title has not been extinguished. (*Bates vs. Clark*, 95 U. S., 204; *Ex parte Crow Dog*, 109 U. S., 556; *United States vs. Forty-three Gallons Whiskey*, 93 U. S., 188; *United States vs. Le Bris*, 121 U. S., 278.) While the title of the Indians has always been held by this court to be a right of occupancy only, with the fee in the United States, at a very early date it was also held that their title was one which should be respected by the courts until extinguished by proper authority. (*Fletcher vs. Peck*, 6 Cranch, 142; *Johnson vs. McIntosh*, 8 Wheat., 543.) More recently this court has declared that their right of occupancy should be respected until they have abandoned or voluntarily ceded their lands to the Government, or to individuals with the approval of the Government; and that the habits and customs of Indians and their means of securing a living should be considered, and the conclusion was reached that their hunting grounds were as much in their actual possession as the cultivated fields of the white man, and that their right

to their exclusive use, in their own way, should be as much respected until abandoned, ceded to the Government, or sold to individuals with the approval of the Government; and that, although the right of occupancy and possession attached itself to the fee without further grant when abandoned by the Indians, their right of occupancy was as sacred to them as the fee to the Government. (*Mitchel vs. United States,* 9 Pet., 711; *Clark vs. Smith,* 13 Pet., 195; *United States vs. Cook,* 19 Wall., 591; *Cherokee Nation vs. Georgia,* 5 Pet., 1; *Beecher vs. Wetherby,* 95 U. S., 517; *United States vs. Kagama,* 118 U. S., 37.)

The Cherokee tribe of Indians from time immemorial possessed, according to the usual Indian title by occupation, a large territory in the States of North Carolina and Georgia. The first treaty ever entered into between the Government and this tribe of Indians was on November 28, 1785 (7 Stat., 18), and was called the treaty of Hopewell. By the fourth article of this treaty a portion of the ancient possessions of the Cherokees was set apart by natural boundaries as their future hunting ground, and from that time to the present day the Cherokees have resided on lands set apart by the Government for their occupation.

After the treaty of Hopewell, owing to the rapid settlement of the country where the Indians were located, numerous other treaties were entered into between the Cherokees and the Government, changing the boundaries of their reservation and looking to their ultimate removal to lands west of the Mississippi River; and with this end in view, Congress on May 28, 1830 (4 Stat., 411), passed an act entitled "An act to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the River Mississippi," the first section of which provides:

> That it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States, west of the River Mis-

sissippi, not included in any State or organized Territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there; and to cause each of said districts to be so described by natural or artificial marks as to be easily distinguished from every other.

And section 3 provides:

> That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided always*, That such lands shall revert to the United States, if the Indians become extinct or abandon the same.

The act of May 28, 1830, provided, as will be readily perceived, for an exchange of lands, the newly acquired lands to be held by exactly the same title as the lands surrendered, and under the same paramount authority of the Government of the United States. This policy of the Government was intended to operate to the advantage both of the Indians and the white settlers living adjacent to their new homes.

The Cherokees had for a long time been divided into two factions, one of which was desirous of engaging in the pursuits of agriculture and the assumption of civilization, while the other was equally desirous of adhering to its ancient traditions of securing a means of livelihood through the chase. So a treaty was entered into between the Govern-

ment and the Cherokee Nation on July 8, 1817 (7 Stat., 156), by which those Indians who desired to embrace civilization and an agricultural life should remain at their old homes, and those who wished to continue the lives of their forefathers and secure a living by hunting and fishing were to remove to what is now the State of Arkansas, where the Government agreed, upon their ceding their eastern lands, to give them lands in exchange. In pursuance of this agreement a large part of the Cherokees removed to Arkansas.

The advance of civilization having continued to encroach upon the lands of the Cherokees, both east and west of the Mississippi River, articles of a convention were entered into between the Government and the Cherokees west of the Mississippi River on May 28, 1828 (7 Stat., 311), the object of which was to secure to the Cherokee Indians living west of the Mississippi River a permanent home, to relieve them from intolerable conditions surrounding their residence in Arkansas, and to solve the problem of their removal when the Territory of Arkansas should become a State.

By article 2 of the convention the United States agreed to guarantee to the Cherokees forever 7,000,000 acres of land and an outlet to the west in what was afterwards Indian Territory, by natural boundaries.

The convention of May 28, 1828, was carried into effect by the treaty of February 14, 1833 (7 Stat., 414), which, after reciting the facts contained in the articles of convention, set out by natural boundaries the lands agreed to be guaranteed to the Cherokees west of the Mississippi River. These lands were situated in what was afterwards known as Indian Territory, now a part of the State of Oklahoma. The Cherokees on their part agreed to cede all their other lands to the Government.

Two years afterwards, as the Cherokees were anxious to make some arrangement with the Government by which the difficulties they experienced in their residence within

the central part of the United States under the jurisdiction and laws of State governments should be terminated, and with a view of reuniting their people east and west of the Mississippi River again, and securing a permane home for themselves and their posterity, where they could establish a government of their choice more in accordance with their views, habits, and conditions, entered into a treaty known as the treaty of New Echota, on December 29, 1835 (7 Stat., 478).

By article 2 of the treaty of New Echota the United States agreed to guarantee to the Cherokees the 7,000,000 acres of land and what is known as the "Cherokee Outlet," supposed to contain 6,574,135.14 acres, guaranteed by the treaty of May 14, 1833, and in consideration of the sum of $500,000 an additional 800,000 acres east of the Osage lands.

By article 3 the United States agreed that the lands ceded in article 2, by natural boundaries, should be included in one patent, executed to the Cherokee Nation of Indians by the President of the United States, according to the provisions of the act of May 28, 1830.

Accordingly, on December 31, 1838, a patent was executed by the President conveying to the Cherokee Nation the two tracts of land described in article 2 of the treaty of New Echota, containing 14,374,135.14 acres, subject to certain conditions, and among them "to the condition provided by the act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above-cited third article, and which condition is that the lands hereby granted shall revert to the United States if the Cherokee Nation becomes extinct or abandons the same" (Laws of the Cherokee Nation, 1892, pp. 415-424).

The title to the lands conveyed by the above patent to the Cherokee Nation was the ordinary title by which Indian lands are held, and was the same title by which the Cherokees held their original lands in North Carolina and Georgia. The ordinary Indian title we have already made clear by

references to numerous decisions of the Supreme Court. The act of May 28, 1830, *supra,* referred to frequently, provided for the *exchange* of lands with Indians residing in any of the States or Territories, and for their removal west of the Mississippi, the lands to be given in exchange by the United States being lands to which the Indian title had been extinguished. In this particular case the lands were situated west of the Mississippi River, in what was afterwards known as Indian Territory, and had been acquired from other Indians, and had never been in the possession of the Cherokees.

From its earliest dealings with Indian tribes the United States has followed the uniform policy of setting apart, out of lands ceded by various treaties, permanent homes for the tribes who have disposed of their lands. In the case of the Cherokees it was impossible to set apart a reservation out of lands to which the Indian title had been extinguished west of the Mississippi River, for the reason that the Cherokees have never been in possession; and, as was recognized by the act of 1830, it became necessary to convey the title in some other way, and the simplest way was that which was adopted—by patent.

The term "exchange," used in the act of May 28, 1830, shows a deliberate purpose in Congress to convey to the Cherokees lands in the Indian Territory, to be held by the same title as the lands had been held by them east of the Mississippi River. The word "exchange" as used in the act has a well settled legal meaning. Judge Blackstone says: "The estates exchanged must be equal in quantity, not of value, for that is immaterial, but of *interest;* as fee simple for fee simple, a lease for twenty years for a lease for twenty years, and the like" (2 Bl. Com., 323, and cases cited in the notes; see also 7 Barb., 638; 21 Wis., 123).

After the execution of the patent conveying the lands, as stated above, the Cherokee Nation removed to Indian Territory and settled thereon, and have continued to reside there

ever since, holding their tribal lands by the ordinary Indian title.

In the case of *United States vs. Rogers* (4 How., 567), the court held:

> The country in which the crime is charged to have been committed is a part of the territory of the United States and not within the limits of any particular State. It is true it is occupied by the Cherokee Indians. But it has been assigned to them by the United States as a place of domicile for the tribe and *they hold with the assent of the United States and under their authority.* (*United States vs. Kagama,* 118 U. S., 375; *Talton vs. Mayes,* 163 U. S., 376.)

After the removal of the Cherokee Indians to the Indian Territory they held by exactly the same title and under precisely the same administrative power of the United States as when they occupied their eastern lands, and the laws governing Indian tribes generally and the decisions of the courts upon the plenary power of Congress over Indian tribes applied to the Cherokee Nation with exactly the same force and effect.

We also call the attention of the court to the case of *Vanderbilt vs. Eidman* (196 U. S., 480, 501) to show that the title in question was a contingent interest and not a fee-simple title in the tribe. The question as to whether the tribal title under the patent was a fee simple came up directly in the case of the *Cherokee Nation vs. Hitchcock* (187 U. S., 294), where the position was taken by the nation that it held a fee-simple title, and that the act of 1898 was therefore invalid in its attempt to place the supervision of the leasing of their lands under the Secretary of the Interior, and the Supreme Court held on December 1, 1902, that notwithstanding the fact that the Indians had recently become citizens of the United States, the Government still

possessed the power of control over their property, which at that time was all tribal.

This case also establishes another fact, that this court has made no distinction between cases arising out of property rights in the Cherokee Nation and cases arising out of property rights in other Indian tribes.

The cases of the *Cherokee Nation vs. Hitchcock, supra*, and *Lone Wolf vs. Hitchcock* (187 U. S., 553) were argued together in the Court of Appeals of the District of Columbia, and the Lone Wolf case was decided first and the case of the Cherokee Nation was afterwards decided on the sole authority of the Lone Wolf case. Upon appeal the two cases were again argued together. The case of the *Cherokee Nation vs. Hitchcock* was decided on December 1, 1902, and the case of *Lone Wolf vs. Hitchcock* was decided on January 5, 1903, and the court there said:

> Indeed, the controversy which this case presents is concluded by the decision in *Cherokee Nation vs. Hitchcock* (187 U. S., 294), decided at this term, where it was held that full administrative power was possessed by Congress over Indian tribal property.

There are also a number of other Cherokee cases cited in this opinion.

This court in considering the Choctaw patent, in which much stronger language was used than in the Cherokee patent, said in the case of *Fleming et al. vs. McCurtain et al.* (215 U. S., 56-63):

> What we have said shows another sufficient answer to the plaintiffs' claim. They say and argue, as they must in order to make out their right to a distribution to themselves, that the Choctaws and Chickasaws no longer exist as nations. But if so, the grant also was at an end when the nations ceased to be, and it rested with the bounty of the United

States to decide what should be done with the land, except so far as it already had been decided by treaties or statutes upon which the plaintiffs do not and cannot rely. It is said that by Article 18, in case of any well-founded doubt as to the construction of the treaty, it is to be construed most favorably toward the Choctaws. But there is no well-founded doubt, except whether the construction contended for would have been regarded as favorable to the Choctaws, since it would have cut down the autonomy that the treaty so carefully expressed. See further, *Stephens vs. Cherokee Nation,* 174 U. S., 445, 488. *Cherokee Nation vs. Hitchcock,* 187 U. S., 294, 307. *Lone Wolf vs. Hitchcock,* 187 U. S., 553, 568.

The decision of this court in the case of *Holden vs. Joy* (17 Wall., pp. 211, 247) did not relate to the lands involved in this case.

Under the treaty of 1835 (7 Stat., 478-486) a large tract of land embracing over 13,000,000 acres was set apart to be conveyed by patent to the Cherokee Nation in exchange for their lands in North Carolina and Georgia. However, as doubt existed as to the sufficiency of those lands for the wants of the nation, it was further provided by the same article—article 2 of the treaty—that 800,000 acres of land, known as "neutral land," in Kansas to which the title of the Osage Indians had been extinguished, should be sold and conveyed to the Cherokee Nation by patent in fee simple in consideration of $500,000, to be taken from the Cherokee national fund. The third article of the treaty provided that the lands ceded by the treaty of 1833, including the Cherokee Outlet and those ceded by this treaty (the 800,000 acres), should all be included in one patent executed to the Cherokee Nation by the President according to the provisions of the act of May 28, 1830, *supra.*

THE PLENARY POWER OF CONGRESS OVER INDIAN TRIBES.

As the father is the natural guardian of his children, so is the Government of the United States the natural guardian of the Indians residing within its limits. A guardian is a temporary parent. In England the Lord Chancellor is the general guardian of all infants, while in the United States the court of probate or the court of chancery is the general guardian, the nominal guardian being merely an agent or officer of the court (1st Bl. Com., 463; 3 *Id.*, 141; 2 *Id.*, 461).

The guardian in the performance of his duties is required to exercise ordinary skill, prudence, and caution. He may lease his ward's real property and receive the rents and profits, and may sell his personal property without an order of court. Under an order of the proper court he may sell his real estate or may convert his personal property into real estate (*Lamar vs. Micou*, 112 U. S., 463-470; *Boz vs. Milliken*, 83 Ky., 638; *Eyster's Appeal*, 16 Pa., 372; *Thaw vs. Ritchie*, 136 U. S., 519; *Ex Parte Jewett*, 16 Ala., 409; *Smith vs. Sackett*, 10 Ill., 534; *Dodge vs. Cole*, 97 Ill., 338; *Thompson vs. Mebane*, 4 Heisk. (Tenn.), 370; *Lancaster vs. Lancaster*, 13 Lea (Tenn.), 132; *Hurt vs. Long*, 90 Tenn., 445).

The Government of the United States, acting through its legislative branch, is the guardian of the Indians within its limits, and its policies are carried into effect by the President, acting through the agency of the Secretary of the Interior. Everything that a guardian and a court of probate or a court of chancery may do for the ordinary white citizens may be done by Congress through the President for the Indians, so long as their tribal relations continue. (*Worcester vs. Georgia*, 6 Pet., 515; *Elk vs. Wilkins*, 112 U. S., 96; *United States vs. Kagama*, 118 U. S., 375; *Choctaw Nation vs. United States*, 119 U. S., 1; *Cherokee Nation vs. Southern Kan. Ry. Co.*, 135 U. S., 641; *Talton*

vs. Mayes, 163 U. S., 376; *Roff vs. Burney*, 168 U. S., 218; *Stephens vs. Cherokee Nation*, 174 U. S., 445; *Jones vs. Meehan*, 175 U. S., 1; *Lone Wolf vs. Hitchcock*, 187 U. S., 553; *United States vs. Rickert*, 188 U. S., 432; *United States* 73 Fed. R., 72; *Winters vs. United States*, 207 U. S., 564.)

The similarity of the guardianship of the General Government over Indian tribes to the care of the States for its incompetent citizens appears to have been recognized by the court in this case (Rec., p. 40).

> These acts of 1904 and 1906, and any other acts looking to the protection of the title of these full-blood Indians to the lands allotted to them, are analogous to the protection afforded by the States to the property of infants and others incompetent from any cause to manage their own affairs, though they be citizens of the United States.

Prior to 1871 the Government recognized Indian tribes as possessing some of the attributes of nations and entered into numerous treaties for the extinguishment of the title to tribal lands and for other purposes. On March 3, 1871 (16 Stat., 566; sec. 2079 Rev. Stat.), Congress provided that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by a treaty"; and as was said by this court in *In re Heff* (197 U. S., 488-509) "from that time on the Indian tribes and the individual members thereof have been subjected to the direct legislation of Congress which, for some time thereafter, continued the policy of locating the tribes on separate reservations and perpetuating the communal or tribal life" (p. 498).

This policy has been justified and sustained by the courts upon the theory that the Indians of all tribes are wards of the United States, and, while recognized as distinct political communities, they are still considered as in a condition of

pupilage or dependency and subject to the paramount authority of the United States.

In the case of the *Cherokee Nation vs. Hitchcock* (187 U. S., 294), the court, referring to the case of *Stephens vs. Cherokee Nation* (*supra*), said:

> The plenary power or control by Congress over the Indian tribes and its undoubted power to legislate, as it has done through the act of 1898, directly for the protection of the tribal property, was in that case reaffirmed;

and the opinion closes with the broad statement that—

> The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature; the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts.

The case of the *Cherokee Nation vs. Hitchcock* followed the way clearly marked out by earlier decisions of this court. In the case of *Elk vs. Wilkins* (*supra*), the court said:

> But the question whether any Indian tribes, or members thereof, have become so far advanced in civilization that they should be let out of the state of pupilage and admitted to the privileges and responsibilities of citizenship, is a question to be decided by the nation whose wards they are and whose citizens they seek to become, and not by each Indian for himself.

In the case of the *Cherokee Nation vs. Southern Kansas Railway Company* (*supra*), this court said:

> From the beginning of the Government to the present time they have been treated as "wards of the

> nation," "in a state of pupilage," "dependent political communities," holding such relations to the General Government that they and their country, as declared by Chief Justice Marshall in *Cherokee Nation vs. Georgia* (5 Peters, 1, 17), "are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and domination of the United States that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility."

In the very important and far-reaching decision in the case of *Lone Wolf vs. Hitchcock* (*supra*), decided one month after the case of the *Cherokee Nation vs. Hitchcock*, this court said:

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, *not subject to be controlled by the judicial department of the Government.* Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations (*Chinese Exclusion case*, 130 U. S., 581, 600), the legislative power might pass laws in conflict with treaties made with the Indians.

It will be observed that the act of Congress, the validity of which was in question in the Lone Wolf case, provided, in violation of existing treaties with the Indians, by direct legislation for the allotment of their lands, the sale of their surplus lands, and the disposition of the proceeds of such sales, upon the theory that they were wards of the United

States. In concluding its opinion the Court, upon the authority of *Stephens vs. Cherokee Nation* (*supra*), used language which would appear to indicate that there is no limit to the plenary power of Congress over Indian tribes and their property, and the courts of law have no jurisdiction to interfere with its exercise.

> We must presume that Congress acted in perfect good faith in the dealing with the Indians of which complaint is made, and that the legislative branch of the Government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary can not question or inquire into the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. The legislation in question was constitutional and the demurrer to the bill was therefore rightly sustained.

When Congress extended the period of restrictions upon alienation of the lands of full-blood Cherokee Indians by the act of April 26, 1906 (*supra*), from five to twenty-five years on their surplus allotted lands, and from twenty-one to twenty-five years on their homesteads, it was acting well within its authority as guardian of the Indians; and as the tribal government of the Cherokee Nation still remains in existence, and its guardianship has never been abandoned by the Government, the courts have no power to question the authority of Congress to legislate for the benefit of its wards. As was said by the court in the case of *Heff*, *supra* (p. 499), the Government "may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*," but that it was "for Congress to determine when and how that relationship of guardianship shall be abandoned"; and that

"it is not within the power of courts to overrule the judgment of Congress." The court further said in substance that there existed a presumption that no radical departure from the policy of Congress was intended, and that the "courts may wisely insist that the purpose of Congress be made clear by its legislation."

Upon this subject the Court of Claims said (Rec., p. 35):

> Another principle of law equally well established is that every one who is competent and *sui juris* to act for himself may employ another to act for him; and if not competent and *sui juris* to act for himself, the Government, through its proper channel, may act for him to the end that he be protected in his rights of person and property.
>
> "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government." (*Lone Wolf vs. Hitchcock*, 187 U. S., 553, 565, quoted in the case of *Matter of Heff*, 197 U. S., 488, 498.) But this question is too well established to require further comment.

The Cherokee Tribal Government Still in Existence and Recognized as Such.

It is a well-established fact that the tribal government of the Cherokee Nation is still recognized as an existing entity by the political department of the United States Government.

Section 63 of the act of July 1, 1902, *supra*, with a view to the complete settlement of the affairs of the Cherokee Nation by March 4, 1906, provided that "the tribal government of the Cherokee Nation shall not continue longer than March 4, 1906," but when that date arrived it was discovered that

the enrollment of the Cherokee citizens had not been completed, and that a large part of the tribal lands were still unalloted; therefore, Congress, by a joint resolution approved March 2, 1906 (34 Stat., 822), continued the tribal government in the following language:

> The tribal existence and present tribal government of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until the property of such tribes or the proceeds thereof shall be distributed among the individual members of said tribes, unless hereafter otherwise provided by law.

Afterwards, by section 28 of the act of April 26, 1906, *supra*, the tribal government of the Cherokee Nation was continued still further or "until otherwise provided by law," and that no act of Congress has since been passed abolishing the tribal government; it must be considered for all purposes as still in existence and in full force and effect.

The Court of Claims also recognized the Cherokee Nation as a political community on October 7, 1904, when it was allowed to intervene in the case of the *Intermarried Whites vs. The United States* (40 C. Cls., 411), and by this court November 5, 1906 (203 U. S., 76).

The members of the Cherokee Nation were citizens of the United States when the allotment act of July 1, 1902, *supra*, was passed, imposing restrictions upon alienation, encumbrance, or leasing of individual allotments for the period of five years from the date of the issuance of the patents. They were also citizens and the government of the Cherokee Nation was as much of a government and had as much power on April 26, 1906, when the act extending the period of restrictions upon the alienation, encumbrance, or leasing of allotted lands was passed. At the present time even there are still lands of the Cherokee Nation unallotted and tribal

fund undistributed, for which lands patents must be issued, signed by the principal chief, as provided in section 58 of the act of July 1, 1902. It therefore follows there can be nothing in the argument of the petitioners that the tribal government of the Cherokee Nation was abolished when the act of July 1, 1902, was ratified and promulgated on August 7 and 12, 1902, respectively.

It is also strongly urged by the petitioners as an argument, the force of which we fail to appreciate, that the Cherokee Indians are now not only citizens of the United States, but also citizens of the State of Oklahoma. In view of this position of the petitioners, the attention of the court is invited to the historical fact that the State of Oklahoma was not admitted into the Union until November 16, 1907, whereas the act extending the period of restrictions, the validity of which is now in question, was passed April 26, 1906, the act of reference under which this suit was brought was passed March 1, 1907, and the suit itself was instituted on March 16, 1907.

The enabling act admitting Oklahoma into the Union as a State (34 Stat., 267), so far from disclosing an intention upon the part of Congress to emancipate the Cherokee Indians or their lands from governmental control, expressly reserves such control from the constitution of the new State. Section 1 provided:

> That nothing contained in the State constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territory (so long as such rights shall remain unextinguished), or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed.

And the third clause of section 3 of said act provided.

> That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.

The Court of Claims in considering this case reached the conclusion that the tribal government of the Cherokee Nation still continues for all purposes under existing laws (Rec., p. 29), and in its opinion (Rec., p. 36) the court said:

> Referring to the acts of Congress continuing the tribal government, and the effect of those acts, the court in the case of *Muskrat et al. vs. United States* (44 C. Cls., 137), said:
>
> "Section 63 of the act of July 1, 1902, provides that 'the tribal government of the Cherokee Nation shall not continue longer than March 4, 1906;' but by joint resolution of Congress, March 2, 1905 (34 Stat. L., 822), the tribal existence and present tribal governments of the Cherokee Nation and other civilized tribes in the Indian Territory were 'continued in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes, unless hereafter otherwise provided by law.' And thereafter, by section 28 of the act of April 26, 1906, the tribal existence and present tribal government of said nation was

with certain restrictions therein specified, 'continued in full force and effect for all purposes authorized by law until otherwise provided by law.'

"Therefore, in considering the questions involved, we shall assume the validity of those provisions continuing the tribal existence and tribal government of the Cherokee Nation in force and effect until all property of said nation shall have been distributed among the individual members thereof."

On the authority of those acts the court must assume the continued existence of the tribal government of the Cherokees. Nor will we analyze the acts to ascertain of how much authority the tribal government has been shorn. We are aware of no authority which makes power in the tribe to act essential to constitute tribal relations, though some power may be presumed.

As the United States is the self-constituted guardian of the Indians, with plenary authority over their tribal relation, it is for Congress and Congress alone to determine when that relation shall cease. In other words, when Congress by their legislation have declared that the tribal government of the Cherokees shall "continue in full force and effect for all purposes authorized by law until otherwise provided by law," the courts can not enter into the quantum of authority remaining in the tribe, and by construction defeat the will and purposes of Congress.

The Plenary Power of Congress Is Not Affected by the Citizenship of Indians.

The plenary power of Congress over Indian tribes was not affected by the act of March 3, 1901 (31 Stat., 1447), granting citizenship to the Indians of the Indian Territory in common with other Indians. Section 6 of the allotment act

of February 8, 1887 (24 Stat., 390), as amended, provides, *with the amendment of March 3, 1901, in italics:*

> And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provision of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, *and every Indian in the Indian Territory,* is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens.

The act of March 3, 1901, being but an amendment to the act of February 8, 1887, did not operate to change the status of the Indian tribes under that act, as will clearly appear by the construction placed upon it by numerous decisions of the courts.

The authority of Congress, so long as the tribal existence is recognized by the political department of the United States, is supreme over the lands of the tribes or of the individual Indians. (*Kansas Indians*, 5 Wall., 756, 757; *Jones vs. Meehan, supra.*)

The court soon after this, in passing upon the question of the relation of citizenship to the control over the property of individual Indians by Congress, in the case of *United States vs. Rickert* (*supra*), said:

> It is said that the State has conferred upon these Indians the right of suffrage and other rights that ordinarily belong only to citizens, and that they ought, therefore, to share the burdens of government like other people who enjoy such rights. These are considerations to be addressed to Congress. It is for the legislative branch of the Government to say when

> these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship. This is a political question which the courts may not determine.

In the case of *Farrell vs. The United States* (110 Fed. Rep., 942) it was held that—

> It is the settled rule of the judicial department of the Government, in ascertaining the relations of Indian tribes and their members to the nation, to follow the action of the legislative and executive departments, to which the determination of these questions has been especially intrusted. (*United States vs. Holliday*, 3 Wall., 407; *United States vs. Earl*, 17 Fed. Rep., 75, 78.)

The mere facts that the appellants, who are Indians, have taken allotments of land and have been made citizens of the United States do not operate of themselves, during their status of wardship, to limit or diminish the power of control and protection extended over them by the Government of the United States. The plenary power of Congress over the property of the Cherokee Indians has not been affected by the allotment act of July 1, 1902, nor has it been affected by the conveyance of allotments by certificates or patents subject to a restriction of five years upon alienation or encumbrance by said act. The administrative power of Congress over the property of the Cherokee Nation, whether held in common or by the individual, has never been surrendered, and until this has been done by Congress in clear and unmistakable language, such power must continue in full force and effect. (*Hitchcock vs. Bigboy*, 22 Appeal Cases, D. C., 275; *Beck vs. Flournoy Live Stock Co.*, 65 Fed. Rep., 30; *Pilgrim vs. Beck*, 69 Fed. Rep., 895; *United States vs. Flournoy Live Stock Co.*, 71 Fed. Rep., 576; *United States vs. Mullin*, 71 Fed. Rep., 682.)

The United States Circuit Court, in the case of *Ross vs. Eells* (56 Fed. Rep., 855), sustained the claim of the plaintiff that members of the Puyallup tribe in the State of Washington, to whom allotments had been made, and who became citizens of the United States and also of the State when admitted into the Union, had been emancipated from the control of the Government of the United States; but upon appeal to the Circuit Court of Appeals (64 Fed. Rep., 417) the decision of the lower court was reversed, the appellate court holding that—

> The act of February 8, 1887, which confers citizenship, clearly does not emancipate the Indians from all control or abolish the reservation.

And the court, citing with approval a Massachusetts case, said, "And it was held in *In re Coombs* (127 Mass., 278) that it was competent for the legislature to continue the guardianship by the State after they had been made citizens." This case was carried on appeal to the Supreme Court of the United States and the appeal was dismissed (163 U. S., 702). It unquestionably follows that if a State has the power to continue its guardianship over Indians after they have been made citizens, the United States, the natural guardians of the Indians, has the same power.

Nor is there anything in the decision in the *Heff case* (197 U. S., 488), upon which the petitioners place great reliance, in conflict with the other authorities which we have cited. This court in construing the Kickapoo treaty and its relation to the act of 1887, granting citizenship to Indian allottees, there held that Congress had the power, and by the language used, had relinquished guardianship over Indians, who had become citizens of the United States in so far as they became subject to the police regulations of the State; but the court at the same time was careful to point out the fact that their having been made citizens of the United States, and of the State in which they lived, in no way interfered

with the guardianship and control of their property rights by Congress; and said, in discussing the relationship of the Government to the Indians, that "it is not within the power of the courts to overrule the judgment of Congress."

This court in the case of *McKay vs. Kalyton* (204 U. S., 467) discussed the relation of citizenship to civil and political rights and to property rights, and reviewed the decisions in the cases of *In re Heff* and *The United States vs. Rickert*, and reached the conclusion that the property rights of tribal Indians remained unaffected by the question of citizenship.

The discussion of this entire question by the Supreme Court is also found in the case of *Dick vs. United States* (208 U. S., 340), decided on February 24, 1908.

The most recent discussion of this entire subject in which this court has reviewed the cases of *Rickert, Heff, McKay vs. Kalyton*, and others, is found in the case of the *United States vs. Celestine* (215 U. S., 278-291), in which the court has used this significant language:

> The act of May 8, 1906, c. 2348, 34 Stat., 182, extending to the expiration of the trust period the time when the allottees of the act of 1887 shall be subject to State laws, is worthy of note as suggesting that Congress, in granting full rights of citizenship to Indians, believed that it had been hasty.

Most cogent of all reasons, in the face of existing conditions, there could have been no intention upon the part of Congress to emancipate the members of the Five Civilized Tribes from control and supervision by the act of March 3, 1901, *supra*, for their citizenship rolls had been commenced but a short time before, none of their tribal lands had been allotted, they were not within the boundaries of any State, and therefore not subject to the jurisdiction of any State court, but were controlled exclusively by acts of Congress, under the supervision of the Department of the Interior and

the jurisdiction of the courts of the United States provided by Congress for the Indian Territory.

The Court of Claims, in discussing the effect of citizenship upon the status of these Indians (Rec., pp. 36 and 37), said:

> In the case of *Matter of Heff, supra* (p. 499), the court said:
>
> "Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the Government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear the question is at an end."

On the authority of that case the claimants contend that by virtue of the act of March 3, 1901, declaring Cherokee citizens to be citizens of the United States, Congress terminated the relation of guardian and ward, thereby investing them with full power and authority as other citizens of the United States over the control of their property.

In the case of *Cherokee Nation vs. Hitchcock, supra* (at p. 309), being an action to enjoin the

Secretary of the Interior, under section 13 of the act of June 28, 1898 (30 Stat. L., 495), from leasing oil lands held for the benefit of said nation, the court said: "There is no question involved in this case as to the taking of property; the authority which it proposes to exercise by virtue of the act of 1898 has relation merely to the control and development of tribal property, which still remains subject to the administrative control of the Government, even though the members of the tribe have been invested with the status of citizenship under recent legislation."

If citizenship may be conferred upon Indians while in tribal relations without affecting the administrative control of their tribal property, it follows that their communal rights in such property are not thereby removed from the control of Congress.

The attention of the court is called to the fact that the decision in the case of *Cherokee Nation vs. Hitchcock, supra*, referred to by the Court of Claims, was decided on December 1, 1902, after the passage of the acts of March 3, 1901, granting citizenship to the Indians in Indian Territory, and the allotment act of July 1, 1902.

The Allotment Act of July 1, 1902 (32 Stat., 716), and the Allotments Thereunder do not Affect the Control of Congress Over the Disposition and Management of Such Allotted Lands.

The appellants in this case have taken the position that the allotment act of July 1, 1902, was an agreement between the Cherokee Nation and the United States by virtue of which the Cherokee people acquired vested rights in the tribal lands and funds of the Cherokee Nation that could not be impaired or destroyed by subsequent legislation, and, ignoring the guardianship of the United States, they base

their contention upon the erroneous assumption that the citizens of the Cherokee Nation are persons *sui juris*. Whether the appellants rely, to sustain their position, upon the provision of section 10 of the first article of the Constitution, which declares that "no State shall pass any law impairing the obligation of contracts," or that provision of the fifth amendment to the Constitution which declares that "no person shall be deprived of life, liberty, or property without due process of law," is not perfectly clear.

Inasmuch as the prohibition against the impairment of contracts is restricted to States, the appellants appear to have abandoned that provision and devoted their argument, if it may be so termed, to the destruction of rights acquired under the allotment act of July, 1902, by the act of April 26, 1906, *supra*, the alleged destruction of vested rights being the extension of the restrictions upon alienation and leasing of the lands of full-bloods from five to twenty-five years on their surplus lands and from twenty-one to twenty-five on their homesteads.

The right to alienate allotted tribal lands is not a vested right during the existence of the tribal government. Under State laws a minor or other incompetent person may have a fee simple title to lands, but have no power to alienate them. The laws of the different nations of the world and States of the Union differ as to the time when a minor, more particularly a female, shall become of age and competent to manage his or her own affairs. In some States minors become of age at 18 years; in others they do not reach their majority until they have arrived at the age of 21. This being true, if a minor should, under existing State laws, be entitled to come into control of his property at the age of 18, could the authority of the State legislature to extend the period of his minority until he reaches the age of 21 be questioned? The answer is easy, if the law of the State in which he resides does not permit a minor to alienate his lands until he becomes of age, and the law is afterwards amended so as to

increase the age at which he shall reach his majority, it is very clear that the validity of the amendment can not be questioned upon the ground that the minor had been deprived of a vested interest in his lands.

Even among white persons who have never been under the guardianship of the United States or the State in which they live, if found incompetent either as a class or as individuals they may be placed under the care and supervision of a trustee by special act of the legislature of the State where such class or individuals reside. In the case of *Rice vs. Parkman* (16 Mass., 326), which has been extensively quoted by Judge Cooley in his work on Constitutional Limitations (pp. 117, 118), there was a statute already in force which granted to the courts the authority to order the sale of the lands of minors. Notwithstanding this act, however, the legislature of the State passed a special statute empowering the father of certain minors, as guardian for them, after giving bond to the judge of probate, to sell and convey their lands, and put the proceeds at interest on good security for the benefit of such minors. The sale was made, and after the children became of age they brought suit against the party claiming under the sale, upon the ground that the act was void. The validity of the statute was upheld and the court in an able and exhaustive opinion, which has been largely quoted by Judge Cooley, said among other things:

> This power must rest in the legislature in this Commonwealth; *that body being alone competent to act as the general guardian and protector of those who are disabled to act for themselves.*

Judge Cooley has also quoted a paragraph from the opinion in the case of *Cochran vs. Van Surlay* (20 Wend., 365, 373), which we think peculiarly appropriate to the conditions existing in this case:

> A similar statute was sustained by the Court for the Correction of Errors in New York. "It is clearly,"

> says the chancellor, "within the powers of the legislature, as *parens patriæ*, to prescribe such rules and regulations as it may deem proper for the *superintendence, disposition, and management of the property and effects* of infants, lunatics, *and other persons who are incapable of managing their own affairs*" (*id.*, p. 120).

However, as we have already stated, it is not necessary that people should be Indians in order to entitle them to the supervision and protection of the legislature, but any person, or class of persons, who are not competent to manage their own affairs may be protected by the legislatures of the different States, even though there are general provisions upon the statute books which place upon the courts the same duties. It may also be doubted whether there is such a thing as the absolute ownership of property, free and independent in all cases from legislative action.

The law against perpetuity, in order to prevent a man from tying up his property indefinitely, provides that the testator may not devise his real estate beyond a life or lives in being and twenty-one years after, and in many jurisdictions it has been provided by statute that where testators have intentionally omitted their children from the benefits of their wills, the said children may come in for their full share of the estate after the death of such testator. (Amer. & Eng. Enc. of Law, 2d ed., vol. 30, p. 614, and authorities cited.) Provisions of this nature are all more or less interferences with the power of disposition of owners over their property, and the same may be said of the various statutes of limitation that the different States of the Union have in force, which, on the ground of public policy, bar an owner from the recovery of his property after the lapse of a certain time.

In the case of *The United States vs. Flournoy Live Stock and Real Estate Company* (69 Fed. Rep., 891) the claim

was made that as the Indian to whom the land had been allotted had become a citizen of the United States he ceased to be a ward of the Government, and that citizenship in the United States was inconsistent with the prohibition upon the alienation of his land; but the court said that—

> The right to alienate lands is denied to minors, and yet, during their minority they may be citizens of the United States, with all the privileges and rights conferred thereby.

The Supreme Court of the District of Columbia, in the case of *Hitchcock vs. United States ex rel. Big Boy* (22 App. D. C., 275), in discussing the right of the Government to supervise the disposition of the proceeds derived from the sale of allotted lands, said:

> It is of daily experience that in the matter of wills, marriage settlements, deeds of trust, and other similar arrangements, property is tied up and the right of alienation and disposal of it is restricted; and yet it has never been supposed that thereby the right of citizenship of the grantee or beneficiary is impaired. The provision made in the present and other similar cases for those who are or have been wards of the Government of the United States are analogous to ordinary trusts wherein it is sought, by restricting the right of disposition, to guard the beneficiaries against the results of their own improvidence; and we fail to find in either any impairment of the right of citizenship.

And further on in its opinion in the same case the court said:

> But when the United States, as guardian of the Indians, collectively and individually, seeks to secure any specified property to them in such manner

> that they shall not improvidently squander it, we see no reason why the United States may not limit their own grant as they see proper. We see no reason why they might not have done this with white settlers on the national domain, if they had deemed it expedient to do so. The matter of citizenship is an entirely extraneous thing, and has nothing whatever to do with the case. The question is whether the United States have restricted, and how far they have restricted, the use of the property which they have themselves granted.

The Government of the United States, as shown by numerous decisions of this court, is the guardian of its Indians, and Congress has, therefore, the power to advance the age, or declare the period of time, when these wards of the Government may attain their majority and become *sui juris*. Congress has this power and its judgment cannot be questioned by the courts of law (*Cherokee Nation vs. Hitchcock, supra*).

So far as full-blood Cherokees are concerned, the act of July 1, 1902, and the subsequent allotment of tribal lands in severalty were forced upon them against their will and active opposition, for they have always been strongly in favor of maintaining the Cherokee tribal government and holding their lands and other property in common.

In the *Intermarried Whites cases* (203 U. S., 76) the Supreme Court held that the act of July 1, 1902, had been ratified by the votes of white persons who had intermarried with Cherokee citizens, and that they could not take advantage of the act for that reason. The court further said, speaking of the act itself, that—

> Counsel for claimants speak of the act of 1902 as a "treaty," but it is only an act of Congress, and can have no greater effect.

Of the position taken by the full-bloods towards the act of 1902, the Court of Claims has this to say (Rec., pp. 38 and 39):

> But, independent of the findings, the court will take judicial notice of the Indians as wards of the nation and their consequent dependence upon the Government as their guardian. The native Cherokees were even opposed to the allotment act of 1902, preferring to continue their tribal relations and the communal ownership of the lands. This is shown in the *Cherokee Intermarried Whites Case* (203 U. S., 76, 93), where the court, after designating said allotment act as an act of Congress and not a treaty, said: "It is a singular commentary on the situation that the majority of the native Cherokees voted against its acceptance, which was carried by the vote of the whites."

The effect of the allotment act of July 1, 1902, and the citizenship act of March 3, 1901, upon the plenary power of Congress over Indian lands and property has been finally settled, however, by this court in the case of *Cherokee Nation vs. Hitchcock* (*supra*), decided on December 1, 1902, where it was held that the granting of citizenship to the Indians in Indian Territory *did not emancipate the Cherokee Indians from the control of the Government of the United States.*

Even had the act of July 1, 1902, been, instead of an ordinary act of Congress, a treaty it would have been subject to repeal or amendment by subsequent acts of Congress, for, as was said in the case of *Thomas vs. Gay* (169 U. S., 264):

> It is well settled that an act of Congress may supersede a prior treaty, and that any questions that may arise are beyond the sphere of judicial cognizance, and must be met by the political department of the Government.

See also *Cherokee Tobacco case* (11 Wall., 621) and *Lone Wolf vs. Hitchcock, supra.*

Therefore, it follows that so long as the tribal relations of the Indians continue there can be no vested right of alienation in allottees which Congress may not by a subsequent act either further restrict or remove entirely, and the courts of law may not inquire into the motives which actuated Congress in enacting such legislation.

The Act of April 26, 1906 (34 Stat., 137), Was Passed for the Further Protection of the Indians, and Does not Divest Vested Rights.

In order to clearly comprehend the general aim and purpose of Congress in the enactment of sections 19, 20, and 22 of the Act of April 26, 1906, it becomes necessary to understand the existing conditions and the evils intended to be remedied in Indian Territory at the time of the passage of the act.

The Cherokee full bloods still clung to their ancient traditions and were intensely hostile to the new order of things. They were desirous of maintaining their old tribal relations and holding their lands in common as they had always done; but while opposed to allotments in severalty, when, however, the policy of the Government became an accomplished fact, and the certificates of allotment or patents were delivered to them, they wished to be surrounded by as many safeguards as possible. They realized their lack of education, experience, and business capacity, and their total inability to cope with their white and half-breed neighbors, and for these and other reasons they desired the prohibition upon the alienation of their allotments to remain in force. They were aware that whenever Congress had by special legislation removed the restrictions upon the alienation of the lands of full-bloods, they had become the victims of designing land sharks, and had sold their allotments for grossly inadequate prices. They were also aware of the fact

that notwithstanding the prohibition upon alienation imposed by the act of July 1, 1902, as to the validity of which there is no question in this case, a large proportion of the full-bloods had been induced to sell or encumber their lands by deeds, mortgages, and agreements to sell, conditioned to pay certain amounts, also grossly inadequate, whenever a valid title could be given by the grantors; and these instruments, although nothing had been paid by the grantees, had been placed upon record (Rec., p. 28).

It has, we believe, been made clear under the preceding heading that so long as the tribal relations continue there can be no vested right of alienation which Congress may not by subsequent act limit, modify, or restrict. Therefore, after a thorough and complete investigation of conditions existing among the full-bloods and their capacity for assuming complete control and disposition of their lands, the act of April 26, 1906, was passed. Congress recognized its duty in the premises and enacted legislation necessary for the protection of its helpless wards, who were still in a state of pupilage and dependence.

Under the act of July 1, 1902, patents have been, and are still being, delivered to full-blood Cherokees by the Government, which upon their face are unconditional grants of their allotments, but which are nevertheless controlled by the restrictions upon alienation and leasing contained in said act. Before the expiration of the period within which they could not alienate any of their lands, Congress, continuing its control over said lands, by the act of April 26, 1906, extended the period of limitation within which such full-bloods could not alienate their lands to twenty-five years.

It has always been recognized by the courts, as a principle of law, that wherever there is a duty of protection it carries with it the power to protect.

In the case of *The United States vs. Kagama* (*supra*), this court, after reviewing at great length the relations between the Government and the Indian tribes, said:

> From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, *there arises the duty of protection, and with it the power.* This has always been recognized by the Executive and by Congress and by this court whenever the question has been raised.

The decision in the case of *The United States vs. Kagama* was discussed and reaffirmed by this court in the case of *The United States vs. Rickert, supra.*

In the case of *The United States vs. Thurston County, Nebr.* (143 Fed. Rep., 287), decided on March 21, 1906, the court, in an exhaustive opinion also reviewing the relations between the Indian tribes and the Government of the United States and the power of the Government to protect its Indians, said:

> They are still members of their tribes and of an inferior and dependent race, of which the Supreme Court has said that "from their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress and by this court, whenever the question has arisen."

In the case of *The United States vs. Mullin* (71 Fed. R. 682), the duty of the Government to protect its Indians who had received allotments in severalty and become citizens of the United States was discussed, and the court held that the duty of protection still remained with the Government.

The reasons which influenced Congress, in placing restrictions upon the power of alienation by Indians who had received their allotments in severalty, has been stated with

great clearness and force in the case of *Beck vs. Flournoy Co., supra:*

> These limitations upon the power of the Indians to sell or make contracts respecting land that might be set apart to them for their individual use and benefit were imposed to protect them from the greed and superior intelligence of the white man. Congress well knew that if these wards of the nation were placed in possession of real estate, and were given capacity to sell or lease the same, or to make contracts with white men with reference thereto, they would soon be deprived of their several holdings; and that, instead of adopting the customs and habits of civilized life and becoming self-supporting, they would speedily waste their substance and very likely become paupers. The motive that actuated the lawmaker in depriving the Indians of the power of alienation is so obvious, and the language of the statute in that behalf is so plain, as to leave no room for doubt that Congress intended to put it beyond the power of white men to secure any interest whatsoever in lands situated within Indian reservations that might be allotted to Indians.

In the case of *West vs. Hitchcock* (205 U. S., 80) in which the relation between the Indian tribes to the United States, the power of the Government over them, and its duty to protect them were discussed, the court said, in speaking of two sections of the Revised Statutes (441-463):

> We should hesitate a good deal, especially in view of the long-estblished practice of the Department, before saying that this language was not broad enough to warrant a regulation made for the welfare of the rather helpless people concerned. The power of Congress is not doubted. The Indians have been

treated as wards of the nation. Such supervision was necessary and has been exercised.

The appellants have attacked the validity of the act of April 26, 1906, upon the ground that it takes private property without due process of law. The meaning of the phrase "due process of law" has never been made perfectly clear by text writers, nor have they ever attempted a concise or exact definition, but have contented themselves with an attempt to fix its meaning by the method of inclusion and exclusion. It is well settled, however, that "due process of law" is not restricted to the decisions of courts of law, but is equally applicable to legislative acts.

Congress has, however, by the act of April 26, 1906, deprived its wards of nothing which they already possessed. The Government has reaped no advantages from the restrictions upon alienation or leasing of lands except to prevent the full-bloods from becoming paupers and a charge upon the public. Congress has always possessed the power of control over Indian tribes, and the management of their business affairs, but since 1871 this control and management has been carried on by direct legislation, and this course of procedure with regard to Indian tribes and individuals may be termed "due process of law." Therefore, the act in question is part and parcel of the system built up by the Government for the management of Indian affairs, and the act itself, in surrounding the wards of the Government with additional safeguards to prevent them from becoming charges upon the public, has pursued its settled policy of protection through the regular and usual channels of legislation, and it may be said by "due process of law." Congress in extending the period of restrictions upon alienation or leasing of the lands of full-bloods did what, in its judgment, was best for them and what they themselves wanted. There can be, therefore, from the very nature of the case, no question raised of the taking of property without due process of

law; for the propriety of the position taken by defendants has time and again been recognized by the courts, which have uniformly sustained acts of Congress imposing restrictions where the intention to do so was free from ambiguity.

Upon the duty of protection the Court of Claims has this to say (Rec., p. 39):

> The full-bloods or native Cherokees are uneducated and unable to speak the English language, and without the protection of the Government it is manifest that they are liable to lose the lands allotted to them. The restrictions placed upon their lands against alienation, incumbrance, and leasing will be removed when the Government is satisfied that it can withdraw its protection without detriment to the interests of the owners. This is evidenced by the act of May 27, 1908 (35 Stat. L., 312), whereby the acts of 1902 and 1906 have been materially changed and modified, as therein shown.
>
> By section 19 of the act of 1906 the lands upon which the restrictions were imposed are free from taxation so long as held by the original allottees, and this is a benefit and protection and not a detriment to the owner.
>
> As was said by the court in the case of *Lone Wolf vs. Hitchcock* (187 U. S., 553, 567), quoting from the case of *United States vs. Kagama* (118 U. S., 375, 383), "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on

all the tribes." So here the exercise of the power of government is necessary to the protection of the less civilized, the weak and the unlettered full-blood Indians, against designing men, as well as for the safety of those with whom they dwell. This does not involve a taking of the property of the full-bloods, as the acts in controversy simply subject their allotments to administrative control for their sole benefit until they are *sui juris* and competent to protect themselves.

It would be strange indeed if the Government, in dealing with its wards, desiring to aid them in taking an advance step in civilization by conferring upon them citizenship and the right to hold real estate in severalty, could not invoke its own power while tribal relation exists to protect them in the rights thus conferred. We think the power to do so rests in Congress, notwithstanding the citizenship conferred upon the Indians and the allotment of their lands in severalty.

The acts in question seek the protection of those most in need thereof, and they wisely consent to the administrative shield. If they consent, though by the jurisdictional act some of their number are designated to maintain this action, who will be harmed or what principle of law will be violated in holding the acts valid while tribal relations are recognized by Congress?

While the estate of the Cherokee Nation was in process of settlement by the United States, as the guardian of the tribe, it became necessary while allotments were being made, in order to protect the trust estate, to segregate a large class of Cherokee citizens who were unable to protect their allotments by extending the period of inalienability as to their lands, and this was done by the act of April 26, 1906. Not for any selfish advantage to the United States, not to rob them

of the fruits or enjoyment of their allotments, but in order to conserve the interests of the full-bloods and prevent them from becoming a charge upon the United States.

This legislation of Congress was not a taking within the meaning of the fifth amendment to the Constitution; it was simply a control of the property of incompetent Indians for their own protection, and the Supreme Court, in the case of the *Cherokee Nation vs. Hitchcock, supra,* said such a *control* was not *a taking* within the meaning of the Constitution. In addition to this, it may be said that under all the authorities it is well settled that a taking of property by due process of law may be by legislation, as well as by judgments of courts of law. Since 1871, when Congress changed its policy of dealing with Indians from the making of treaties and agreements to control of their property by direct legislation, the Cherokee Nation, as well as all other Indian tribes, have been under the direct and immediate control of Congress, and with this control the courts have uniformly refused to interfere. Legislation by Congress is undoubtedly due process of law so far as the property of Indian tribes is concerned, and the courts will only take jurisdiction in order to interpret those laws. Where they are as free from ambiguity as the acts in question the courts have uniformly refused to take jurisdiction.

On March 21, 1906, the United States Circuit Court of Appeals, in the case of *The United States against Thurston County, Nebr., supra,* held that the fact of Indian allottees becoming citizens of the United States and the State of Nebraska did not in any wise affect the power or duty of the Government to protect their property interests. The court said:

> Their civil and political status, however, does not condition the power, authority, or duty of the United States to exert its powers of Government to control their property.

And to sustain this position the court cited the case of *Wallace vs. Adams* (143 Fed. R., 716; 204 U. S., 415), a Choctaw case, in which the title to the lands was identical with that of the Cherokees.

In the case of *Eells vs. Ross, supra,* where the effect of the act of February 8, 1887, *supra,* conferring citizenship upon Indians who had received their allotments was exhaustively discussed, the court said:

> If it is for the interest of the Indians or of commerce to remove the restraints on alienation, Congress will, no doubt, do so, if applied to, and in the latter case it will be enabled to provide for the interests of the Indians better than they have seemed to have provided for themselves in the contract with the appellee.

In the case of the *National Bank of Commerce vs. Anderson* (147 Fed. R., 87) the court said:

> The granting of citizenship does not affect the character of the title to land allotted to the Indian, nor is the restriction against alienation inconsistent with citizenship.

In the case of *Jones vs. Meehan, supra,* the court, after discussing the relation of Indian tribes to the Government, held that certain land reserved to an Indian by an act of Congress was alienable by his heirs, after his death, for the reason that—

> The inference appears to us to be irresistible, that Congress did not intend that there should thenceforth be any general restriction upon the alienation by individual Indians of sections of land reserved to them, respectively, by a treaty with the United States.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 331.

WILLIAM BROWN AND LEVI B. GRITTS, ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHER CHEROKEE CITIZENS HAVING LIKE INTEREST IN THE PROPERTY ALLOTTED UNDER THE ACT OF JULY 1, 1902, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE CHEROKEE NATION.

Statement of the Case.

According to the opinion of the Court of Claims, the importance of this case can hardly be overstated. It involves the question of the power of Congress, where allotments to tribal Indians have been and are still being made in severalty (Rec., p. 28), with restrictions upon alienation, encumbrance, or leasing, to subsequently, during the existence of the original period of restrictions and during the existence

of the Indian Territory, extend the period of such restrictions. Its decision will affect not only the allotments of 8,689 Cherokee full-bloods directly concerned in this case, but indirectly all of the allotments of full-bloods of the Five Civilized Tribes of Oklahoma, numbering perhaps 30,000 persons (Rec., p. 30).

The act of July 1, 1902 (32 Stat., 716), entitled "An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," contains the following provisions relating to the allotment of Cherokee tribal lands:

> SEC. 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be non-taxable and shall not be liable for any debt contracted by the owner thereof while so held by him.
>
> SEC. 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act.
>
> SEC. 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent.
>
> SEC. 16. If for any reason an allotment should not be selected or a homestead designated by or on behalf of any member of the tribe, it shall be the duty of

said Commission to make said selection and designation.

SEC. 20. If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: *Provided,* That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and proper time, the Dawes Commission shall designate the lands thus to be allotted.

SEC. 21. Allotment certificates issued by the Dawes Commission shall be conclusive evidence of the right of an allottee to the tract of land described therein, and the United States Indian agent for the Union Agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to him, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

SEC. 72. Cherokee citizens may rent their allotments when selected for a term not to exceed one year for grazing purposes only and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same; but leases for a period longer than one year

for grazing purposes and for a period longer than five years for agricultural purposes, and for mineral purposes, may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this section shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. Cattle grazed upon leased allotments shall not be liable to any tribal tax, but when cattle are introduced into the Cherokee Nation and grazed on lands not selected as allotments by citizens the Secretary of the Interior shall collect from the owners thereof a reasonable grazing tax for the benefit of the tribe, and section twenty-one hundred and seventeen of the Revised Statutes of the United States shall not hereafter apply to Cherokee lands.

The act of July 1, 1902, was ratified, in accordance with its provisions, on August 7, 1902 (Rec., p. 20).

In accordance with the provisions of this act the Commission to the Five Civilized Tribes began the allotment of tribal lands to those citizens whose enrollments had been approved on the first Monday of January, 1903, and continued said allotment to those citizens whose enrollments had been from time to time finally approved by the Secretary of the Interior under said act and subsequent acts of Congress, and is still engaged in the allotment of the tribal lands. Patents have been and are still being issued from time to time, in accordance with sections 58 to 62 of said act, to those citizens who have received certificates of allotment.

On April 26, 1906, an act was passed by Congress, entitled "An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes" (34 Stat., 137), which contained the follow-

ing provisions affecting the allotment of Cherokee lands, commonly known as the "McCumber Amendment":

SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however,* That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further,* That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before, the removal of restrictions be, and the same is hereby, declared void: *Provided*

further, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

SEC. 20. That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior, and shall be absolutely void and of no effect without such approval: *Provided,* That allotments of minors and incompetents may be rented or leased under order of the proper court: *Provided further,* That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory.

SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent, and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.

On December 21, 1906, the petitioner, William Brown, filed in the Supreme Court of the District of Columbia a bill attacking the validity of the act of April 26, 1906, *supra*, and praying an injunction upon the ground that the act had been passed in violation of the Constitution of the United States; but, before the hearing upon the bill and answer, Congress passed an act on March 1, 1907, conferring jurisdiction upon this court to hear and determine the validity of the act of April 26, 1906 (Rec., p. 28).

The authority for the institution of this suit, in this court, is found in an item of the Indian appropriation act of March 1, 1907 (34 Stat., 1015, 1028), which reads as follows:

> That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens having like interests in the property allotted under the act of July first, nineteen hundred and two, entitled "An act to provide for the allotment of lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," and David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September first, nineteen hundred and two, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any acts of Congress passed since the said act of July first, nineteen hundred and two, in so far as said acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, and provided for in the said act of July first, nineteen hundred and two.

> And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal by either party to the Supreme Court of the United States, to hear, determine, and adjudicate each of said suits.
>
> The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant; and for the speedy disposition of the questions involved, preference shall be given to the same by said courts, and by the Attorney-General, who is hereby charged with the defense of said suits.
>
> Upon the rendition of final judgment by the Court of Claims, or the Supreme Court of the United States, denying the validity of any portion of the said acts, authorized to be brought into question, in either or both of said cases, the Court of Claims shall determine the amount to be paid the attorneys employed by the above-named parties in the prosecution thereof, for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries under the said act of July first, nineteen hundred and two.

In pursuance of the provision of the jurisdictional act, which required the persons named as plaintiffs to file their petitions in this court prior to September 1, 1907, the plaintiffs, on March 16, 1907, filed their petition (Rec., pp. 1-12), in which they attack not only the validity of the act of April 26, 1906, but also the validity of the act of March 11, 1904 (32 Stat., 65), which reads as follows:

> That the Secretary of the Interior is hereby authorized and empowered to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation,

through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from, and the maps of definite location of said lines approved by, the Secretary of the Interior: *Provided*, That the construction of lateral lines from the main pipe line establishing connection with oil and gas wells on the individual allotments of citizens may be construed without securing authority from the Secretary of the Interior and without filing maps of definite location, when the consent of the allottee upon whose lands oil or gas wells may be located and of all other allottees through whose lands said lateral pipe lines may pass has been obtained by the pipe line company: *Provided further*, That in case it is desired to run a pipe line under the line of any railroad, and satisfactory arrangements cannot be made with the railroad company, then the question shall be referred to the Secretary of the Interior, who shall prescribe the terms and conditions under which the pipe line company shall be permitted to lay its lines under said railroad. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval. And where such lines are not subject to State or territorial taxation

the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, territorial, or municipal authority. And incorporated cities and towns into and through which such pipe lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities, and nothing herein shall authorize the use of such right of way except for pipe line, and then only so far as may be necessary for its construction, maintenance, and care: *Provided*, That the rights herein granted shall not extend beyond a period of twenty years: *Provided further*, That the Secretary of the Interior, at the expiration of said twenty years, may extend the right to maintain any pipe line constructed under this act for another period not to exceed twenty years from the expiration of the first right, upon such terms and conditions as he may deem proper.

On March 26, 1908, the plaintiffs filed an amended petition in which, for the first time, they attack the validity of a provision of the Indian appropriation act of March 1, 1907 (34 Stat., 1025), the same act which carried the jurisdictional act under which this suit was brought (Rec., pp. 13, 14).

The provision in question reads as follows:

> For clerical work and labor connected with the leasing of Creek and Cherokee lands, for mineral and other purposes, and the leasing of lands of full-blood Indians, under the act of April 26, 1906, thirty thousand dollars; for clerical work and labor connected with the sale of inherited and other lands, Five Civilized Tribes, thirty thousand dollars; in all, sixty thousand dollars: *Provided*, That the sums so expended shall be reimbursable out of the proceeds of such land sales and leases, and shall be equitably apportioned by the Secretary of the Interior from the moneys collected from such sales and leases.

The $30,000 provided by the above act for the expenses of leasing Creek and Cherokee land, for mineral and other purposes, and the leasing of the lands of full-bloods have been reimbursed, and the regulations issued by the Secretary of the Interior in pursuance of the act have been revoked (Rec., pp. 28, 29).

The enrolled full-blood Cherokee citizens to whom lands in the Cherokee Nation have been and are still being allotted are, in the main, in favor of the extension of the period of restriction upon alienation, encumbrance, or leasing of their lands; and they are also in favor of the supervision of the Secretary of the Interior over the leasing of their lands and the sale of their inherited lands, as provided in the acts complained of, as they are uneducated and unable to speak the English language and never before owned alienable lands, and without governmental supervision are incompetent to represent and protect themselves in the sale or leasing of their allotted lands (Rec., p. 28).

Prior to the passage of the act of April 26, 1906, *supra*, many full-blood Cherokee citizens had been induced by designing persons to execute deeds of their allotted lands and contracts to sell, and to otherwise encumber their allotments in violation of the provisions of the act of July 1, 1902,

supra, at grossly inadequate compensation, the execution of such deeds, contracts, and mortgages having been made contingent upon the delivery of valid titles to the purchaser or mortgagee, as the case might be. Since the passage of the act of April 26, 1906, large numbers of such deeds, contracts to sell, and mortgages of the allotted lands have been filed almost daily in the offices of the recorders of deeds in the counties of Oklahoma where the land is situated, and suits were brought by the United States embracing 25,338 transactions in the United States courts of the State of Oklahoma to cacel such deeds, contracts and mortgages upon the ground that they are a cloud upon the title of such Indians to the allotments (Rec., p. 28).

These suits were argued in the United States courts of Oklahoma, where a decision was rendered in favor of the defendants and against the Government. The suits were afterwards appealed to the United States Circuit Court of Appeals for the Eighth Circuit, where they were decided in favor of the Government on June 8, 1910 (United States *vs.* Allen *et al.* (179 Fed. R., 13).

The petitioners in this case have never been authorized either by the Cherokee Nation or any enrolled citizens thereof to institute this suit. The restrictions upon the alienation of a part of the surplus lands of the petitioner Brown have been removed, and upon all of the surplus lands of the petitioner Gritts (Rec., p. 27).

Since the suit was instituted, and before its decision by the Court of Claims, an act was passed by Congress, entitled "An act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes," approved May 27, 1908 (35 Stat., 312, 316), by which both the acts of July 1, 1902, and April 26, 1906, have been materially changed and amended, the result of which will be that the decision of this case will not only affect the validity of the act of April 26, 1906, but also the validity of the act of May 27, 1908, several sections of which, peculiarly applicable to this case, read as follows:

That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes, shall, as regards restrictions on alienation or incumbrances, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood, including minors, shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act. No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three, inclusive, of an act entitled "An ac-

to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma.

SEC. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee, if an adult, or by guardian or curator under order of the proper probate court, if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided* That leases of restricted lands for oil, gas, or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: *And provided further*, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the age of twenty-one years and all females under the age of eighteen years.

SEC. 4. That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: *Provided*, That allotted lands shall not be subject or held liable to any form of personal claim or demand against the allottees arising or existing prior to the removal of restrictions other than contracts heretofore expressly permitted by law.

SEC. 5. That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made prior or after the approval of this act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this act, shall be absolutely null and void.

Section 6, after providing that "the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma," provides, among other things, for the appointment by the Secretary of the Interior, under certain rules and regulations to be prescribed by him, of local representatives in the State of Oklahoma, who shall be citizens of that State or now domiciled therein,

> to counsel and advise all allottees, adult or minor, having restricted lands of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any allottee having restricted land he shall, without charge, except the necessary court and recording fees and expenses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other encumbrance of any kind or character, made or attempted to be made or executed in violation of this act or any other act of Congress, and to take all steps necessary to assist said

allottees in acquiring and retaining possession of their restricted lands.

By the same section Congress appropriated $50,000 to pay the necessary expenses of such litigation.

SEC. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided,* That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further,* That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during the life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions; *Provided further,* That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section.

Congress also, by the act of June 25, 1910 (36 Stat., 703, 748), appropriated an additional sum of $50,000 for the

payment of the necessary expenses incident to any suits brought at the request of the Secretary of the Interior, referred to by section 6 of the act of May 27, 1908.

In addition to what has already been said, we wish to call the attention of the court to the fact that the tribal organization of the Cherokee Nation was intact at the date of the passage of the act of April 26, 1906, and is still in existence for all purposes (Rec., pp. 29 and 36).

At the hearing of this case before the Court of Claims the Cherokee Nation was allowed to intervene (Rec., p. 14), and was represented by its national counsel, who participated in the argument (Rec., p. 19).

The case was decided by the Court of Claims on February 8, 1909, and the petition dismissed (44 C. Cls., 283).

ARGUMENT.

The Act of April 26, 1906 (34 Stat., 137), is the Only Act to be Construed in This Case.

The jurisdictional act directs this court "to determine the validity of any acts of Congress passed since the said act of July first, nineteen hundred and two, in so far as said acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, and provided for in the said act of July first, nineteen hundred and two."

The action of Congress in referring these questions to the court arose out of the fact that three suits had been instituted in the Supreme Court of the District of Columbia to enjoin the Secretary of the Interior from carrying into effect the provisions of the act of April 26, 1906, and upon the author-

ity of *Binns vs. United States* (194 U. S., 486-496), the court may consider, in order to determine the questions involved, the reasons given by the chairman of the Judiciary Committee for referring the case to this court.

Mr. CLARK of Wyoming: I see indications that the Senator from New Jersey is going to interpose a point of order. I should like to make a statement before that is done.

Mr. KEAN: Certainly; I withhold the point of order.

Mr. CLARK of Wyoming: Mr. President, by way of explanation I will say that this amendment could perhaps if adopted go a long way toward settling some of the vexed questions of law about which we have been having some difficulty within the last two or three days, to wit, the constitutionality of the McCumber amendment and certain other provisions of the law which we passed to which the McCumber amendment was attached.

Laura Secondine, William Brown, David Muskrat, and others brought three suits which are now pending in the District of Columbia, testing the validity of these acts. To these suits demurrers were interposed by the Government of the United States. The condition of those suits now is that by stipulation further action is delayed until Congress shall have an opportunity to act upon this proposition. If this matter be referred to the Court of Claims, with instructions for speedy action and with opportunity for appeal to the Supreme Court of the United States, it is more than likely that very early action will be had upon those legal propositions.

In that view of the case, I think perhaps that while the amendment might be subject to a point of order as intimated, the benefit to be derived from it would so far outweigh that it ought to remain in the bill

But in discussing the title granted by Congress the court said:

> Title is alienable by the grantee at his pleasure, unless the United States, by a provision of the treaty, or of an act of Congress, have expressly or impliedly prohibited or restricted its alienation,

clearly showing that the court recognized the power of Congress to further restrict alienation.

The above quotation from the opinion in the case of *Jones vs. Meehan* was cited with approval, together with numerous other authorities, in the case of *Francis vs. Francis* (203 U. S., 233), decided December 6, 1906.

Wiggan vs. Conolly Decisive (163 U. S., 56).

In the case of *Wiggan vs. Conolly,* to which the attention of the court is particularly invited, the lands allotted to the Ottawa Indians residing in the State of Kansas, under the treaty of July 16, 1862 (12 Stat., 1237), were made inalienable until "the expiration of five years from the date of the ratification of this treaty," when the allottees should become citizens of the United States. They also became citizens of the State of Kansas at the same time. Esther Wilson, to whom land had been allotted under the treaty, and to whom a patent reciting the conditions of the treaty had been delivered on December 1, 1865, was a minor and a recognized and enrolled member of the Ottawa tribe. On February 23, 1867, prior to the expiration of the five-year limit upon alienation but subsequent to the delivery of the patent, another treaty was entered into extending the time when the allottees should become citizens of the United States two years, with a provision that all who desired to become citizens should make a declaration of their intention in the United States District Court. The treaty, as afterwards amended and finally ratified on October 14, 1868, provided that adults

and heads of families should receive patents in fee simple "so that they may sell their lands without restrictions." The guardian of Esther Wilson, under the order of the Probate Court of Franklin County, Kans., on October 26, 1872, sold her allotment to John Wiggan, from whom the appellants derived their title; the appellees were the heirs of Esther King, deceased. The Supreme Court said:

> It does not appear that the allottee in this case was the head of a family, and, according to the testimony, she was a minor. This treaty of 1867 introduced a new limitation upon the inalienability of lands patented to a minor allottee; that is, the limit of minority. And such limit must be applied to sales voluntary and involuntary, and cut off the right of a guardian to dispose of the estate. The fact that the patent to this allottee had already been issued did not abridge the right of the United States to add, with the consent of the tribe, a new limitation to the power of the individual Indian in respect to alienation. The land and the allottee were both still under the charge and care of the nation and the tribe, and they could agree for still further protection, a protection which no individual was at liberty to challenge.

The court will, of course, observe that the treaties of 1862 and 1867, referred to in the case of *Wiggan vs. Conolly*, were entered into prior to the act of March 3, 1871, *supra*, by which Congress gave notice of its change of policy and its intention to thereafter deal with the Indian tribes by direct legislation instead of by treaty, since which time all of the decisions of the courts to which we have referred have sustained the plenary power of Congress over the Indian tribes and individuals, so long as the tribal relations continue, and have uniformly held that Congress may do by legislative enactment anything that it could have done prior

to that time by treaty. (*Lone Wolf vs. Hitchcock, supra.*)

Hence, it follows as a conclusion of law that Congress had the right, by the act of July 1, 1902, without the consent of the Cherokee people, to provide for the allotment of the Cherokee lands. The ratification by the Cherokee people added nothing to the effectiveness of the act, and Congress never intended that it should, but simply desired an expression of approval from the Cherokee people as a matter of policy and in order to conform in spirit to article 20 of the treaty of July 19, 1866, *supra,* which provided that the request for the allotment of their lands should originate with the Cherokee national council. The Supreme Court evidently understood the position of Congress upon this question when it said in the *Intermarried Whites cases, supra,* speaking of the act of July 1, 1902, "it is not a 'treaty,' but it is only an act of Congress and can have no greater effect." Therefore, if Congress had the power to pass the act of July 1, 1902, it unquestionably had the power also to pass the act of April 26, 1906, the validity of which is now before the court.

It is also equally clear that after the passage of the act of March 3, 1871, *supra,* Congress could, by direct legislation, and without an agreement with the Ottawa Indians, have enacted in identical language the provisions contained in the treaties of July 16, 1862, and February 23, 1867, construed in the case of *Wiggan vs. Conolly.* This was exactly what the Supreme Court in the case of *Lone Wolf vs. Hitchcock, supra,* held that Congress might do. Hence, it follows that if Congress had the power to enact such legislation for the Ottawa tribe it had the same power to enact it for the Cherokee Nation. The consent of the Ottawa tribe was unnessary and the consent of the Cherokee Nation was also unnecessary. The case of *Wiggan vs. Conolly* is almost identical with the case at bar. There a patent had been issued before the expiration of the period of restriction upon alienation, but that period as to minors was afterwards extended before the land had become alienable. In the case at

bar, allotments had been and were still being made, but none of the allotted lands had become alienable under the act of July 1, 1902, when the act extending the period of restrictions was passed.

In the case of *Wiggan vs. Conolly* Congress extended the period of restrictions upon alienation of the lands of minors. In the case at bar Congress, also recognizing the want of business capacity of the full-blood Cherokees, likewise extended the period of restriction upon alienation of their lands.

The record in this case shows that every full-blood Cherokee who has testified, including the petitioner Gritts himself, state that it is for the best interests of the full bloods that the restrictions upon the alienation of their lands should remain. They not only assent to the further protection afforded by the act of April 26, 1906, but they earnestly desire that the restrictions imposed by the act shall remain. All of the Cherokees who are concerned in the validity of this act are in favor of its provisions, and the equities are certainly as strong, if not stronger, than those in the case of *Wiggan vs. Conolly*. In that case Esther King and all others similarly situated were minors when the treaty of 1867 was entered into, and could not personally have consented to an extension of the period of restriction. In the case at bar the full-blood Cherokees, through lack of capacity, are regarded as minors, and they and their lands as subject to the paramount authority of Congress during the period of restriction upon the alienation of their allotted lands.

To recapitulate the points of similarity between the *Wiggan vs. Conolly* case and the case at bar:

(1) In that case the restrictive period was five years. It was the same in this case on the surplus lands of the allottees.

(2) In that case a patent was issued prior to the second act extending the restrictive period, and some patents had

been issued in this case prior to the act of Congress extending the restrictions.

(3) In that case the treaty extending the restrictive period was entered into before the expiration of the five years restrictive period, and in this case the act of Congress was enacted extending the restrictive period before the five years restrictive period had expired.

(4) In that case Esther Wilson, the allottee, was a minor and therefore incompetent to act for herself, and in this case the parties affected are full bloods, wards of the Government, admittedly incompetent and need the protection of the Government.

(5) In that case the extension of the restrictive period was for the protection of the Indians, and the same is true in this case, and the judgment of Congress cannot be controlled by the courts.

(6) In that case the consent of the tribe was given. In this case all the full bloods favor the extension of restrictions except the appellants, and they represent no one but themselves (Rec., pp. 27 and 28).

But appellants say that the extension of restrictions in that case was with the consent of the tribe. That is true, but we have invited attention to a number of decisions of this court rendered since the changed policy of the Government in 1871 toward Indian tribes, holding that Congress had the power to control the Indians and their property by direct legislation instead of by treaty (*Lone Wolf vs. Hitchcock*, 187 U. S., 555; *Cherokee Nation vs. Hitchcock*, 187 U. S., 294; *Stephens vs. Cherokee Nation*, 174 U. S., 445). As elsewhere pointed out, this court held in the *Intermarried White Case* (203 U. S., 76), that the act of July 1, 1902, was not a treaty, "but it is only an act of Congress and can have no greater effect."

In the case of the *United States vs. Allen et al.,* decided by the Circuit Court of Appeals, Eighth Circuit, June 8, 1910, the legislation in question in this case was exhaustively reviewed, the relation of the Five Civilized Tribes to the Government discussed, and numerous authorities cited. In that case the court held these acts of Congress, extending restrictions complained of in this case constitutional, and concludes its opinion in the following language:

> The whole scheme of allotment of lands in severalty to the Indians is an experiment. Congress, in the case of the Five Nations, has attempted to reserve to itself power to deal with the subject in the light of experience. If the plan proves a failure, after a fair trial, it would be disastrous, indeed, if the mere grant of citizenship to the Indian had placed him beyond the power of the Federal Government to adopt such measures for his welfare as experience should show to be necessary (179 Fed. R., 13).

In the case of *Laughton vs. Nadeau* (75 Fed. R., 789) a patent had been issued to a minor member of the Pottawatomie tribe of Indians, which on its face conveyed a fee-simple title to an allotment, which, although procured by fraud, the court held under the circumstances to be a valid conveyance of the allotment. The treaty of 1862 with the Pottawatomie Indians imposed restrictions upon the alienation of their allotted lands. Notwithstanding such restrictions the guardian of David Laughton, the minor, sold his allotment and paid over to him the proceeds of the sale. After the title to the lands had passed through several hands, and twenty-five years after the first sale by his guardian, Laughton, who had long since reached his majority, brought suit against his guardian, Nedeau, and the other grantees, for the removal of the cloud upon the title of his allotment, and the court held that the original and subsequent sales of the prop-

erty were void, and, upon the authority of *Wiggan vs. Conolly, supra,* and *Eells vs. Ross, supra,* said:

> No laches could be imputed to complainant while under disability as a tribal Indian. He and his lands were under the control of the Government.

In the case of *Starr vs. Campbell* (208 U. S., 527), this court held:

> The restrictions on the right of alienation of lands to be allotted in severalty under the Chippewa treaty of 1854 extend to the disposition of timber on the land as well as to the land itself; and the consent of the President to a contract for cutting timber does not end his control over the matter; he may put conditions upon the disposition of the proceeds.

And in its opinion, on page 533, the court said:

> It must at the outset be kept in mind that a policy of control over the Indians has always been observed by the Government. The many exercises of the policy which have been sustained by this court we need not stop to comment on.

And the court, in the case of *Thomas vs. Gay, supra,* had said a number of years before that:

> The unlimited power of Congress to deal with the Indians, their property and commercial transactions, so long as they keep up their tribal organizations, may be conceded.

The extent of the plenary power of Congress was discussed in an elaborate opinion of the Attorney-General as late as August 19, 1907, and the conclusion reached that "Congress has plenary authority to control the affairs and admin-

ister the property of the Five Civilized Tribes in the Indian Territory and other Indian tribes," and in an opinion dated the following day he held that section 19 of the act of April 26, 1906, *supra,* extending the period of restrictions upon the alienation, leasing or incumbrance of Cherokee full-blood lands to twenty-five years, superseded the provisions of the act of July 1, 1902, *supra,* imposing the original five-year restriction as to surplus lands, and the twenty-one year restriction as to homesteads (Op. Att'y Gen., vol. XXVI, pp. 340-355).

In the case of *Smith vs. Stevens* (10 Wall., 321), the Supreme Court sustained, as a valid exercise of legislative authority, a provision in an act of Congress requiring the approval of the Secretary of the Interior before a conveyance could be made of a certain tract of land. The court there said:

> It was considered by Congress to be necessary, in case the reservees should be desirous of relinquishing the occupation of their lands, that some method of disposing of them should be adopted which would be a safeguard against their own improvidence; and the power of Congress to impose a restriction on the right of alienation, in order to accomplish this object, can not be questioned. Without this power, it is easy to see, there would be no way of preventing the Indians from being wronged in contracts for the sale of their lands, and the history of our country affords abundant proof that it is at all times difficult, by the most careful legislation, to protect their interests against the superior capacity and adroitness of their more civilized neighbors. It was manifestly the purpose of Congress, in conferring the authority to sell on the Secretary of the Interior, to save the lands of the reservees from the cupidity of the white race; and, if the provisions of the treaty were not enough for the purpose, the speedy action of Con-

> gress was demanded by the rapid settlement of the adjacent country.

And later on in the same opinion:

> It needs no argument or authority to show that the statute, having provided the way in which these half-breed lands could be sold, by necessary implication, prohibited their sale in any other way. The sale in question not only contravened the policy and spirit of the statute, but violated its positive provisions.

It necessarily follows, from all the decisions referred to, that if Congress could have authorized the Secretary of the Interior to approve the sale of inherited lands, or any other lands, whether inherited or not, it could of course have authorized him to supervise the leasing of such lands, and the decision from which we have just quoted plainly intimates that if the provisions of the treaty under which the lands were allotted had been insufficient for the purpose Congress by a subsequent act could have provided for the further protection of the Indians against their own improvidence.

In the case of Goodrum *et al. vs. Buffalo* (162 Fed. R., 817), on appeal from the Indian Territory, decided in the Eighth United States Circuit Court of Appeals on July 23, 1908, the court said:

> It was argued there, as here, that the limitation was purely personal and did not run with the land; that the granting clause standing alone conveyed a fee simple estate, which was strengthened by the habendum clause, "to have and to hold the said tract of land unto the said John Puyallup, and to his heirs forever." It was further contended, as here, that the restriction in the patent was void because it was repugnant to the grant of an absolute fee. The court said:

> "The Indians are wards of the Government; that these arrangements and provisions are in their interest and by their consent, as indicated in the solemn treaties executed; that the Government from the necessities of the case, in consideration of the inexperience of the Indians, was compelled to insert these provisions in deeds issued to them to prevent them from becoming the prey of sharpers and speculators, who would for an insufficient consideration obtain their lands; the ultimate result being that the Indians would become pensioners of the Government and the mutual interests of the Indians and the Government demanded some such regulation.

In the case of *Harris vs. Hardridge et al.* (166 Fed. R., 109), decided in the Circuit Court of Appeals for the Eighth Circuit on December 2, 1908, the court held that Congress had the power to extend the restriction against alienation upon the allotment of a Creek freedman after the issuance of a patent.

The Appellants Have No Authority to Represent the Cherokee Full-Bloods.

The Court of Claims in its findings of fact has said that neither William Brown nor Levi B. Gritts had any authority from the full-bloods or anybody else to institute this suit; that the only right to file their petition is contained in the jurisdictional act (Finding 12, Rec., p. 27). Nor have the appellants such an interest in this suit as entitles them to have the validity of the act of April 26, 1906, *supra*, tested by this court, for, as found by the Court of Claims, Gritts has had the restrictions removed from all of his surplus lands, and William Brown, a Delaware Indian enrolled as a Cherokee, has had the restrictions removed from a part of his surplus lands (Rec., p. 27).

The restrictions upon the homesteads of both of the appellants were imposed for life, not to exceed twenty-one years. In other words, the mere fact that Congress has named the petitioners in the jurisdictional act must not be taken as conclusive of their status, for if they are found to have no such interest in the matter, as would entitle them, or have not been authorized by the proper parties, to have the questions adjudicated, the court would have no jurisdiction to declare the act invalid even though it should violate provisions of the Constitution of the United States.

We have already shown that when the provisions of the act of April 26, 1906, *supra*, known as the "McCumber Amendment," were referred to the court for construction, the question of the interest of the claimants was not conceded by any means, and it was evidently the intention of Congress to turn over the whole matter to the Court of Claims to determine, among other things, the representative capacity of the petitioners to sue, as well as their interest in the controversy. The appellants, it will be remembered, were not authorized to sue for anybody but themselves, and even their own interests must be identical with those of the full-bloods whom, without authority, they pretend to represent, but, as already stated, a substantial part of *their restrictions* had been removed. And in this connection it is important to note that before the trial of this case by the Court of Claims jurisdiction had been conferred upon the Secretary of the Interior by the act of May 27, 1908, *supra*, to remove, in his discretion, the restrictions upon all of the lands of any of the members of the Five Civilized Tribes, and the appellants, if competent to manage their own affairs, could have had their restrictions removed without coming into court.

This court, in the case of *Stewart vs. The United States and the Osage Indians* (206 U. S., 185), said:

> The passage of the act did not imply an admission that there was anything due the claimant. It simply

provided for the presentation of his claim to the court and for a decision on the merits, *without assuming to say that he had any claim of a meritorious nature.*

This is a most remarkable case. Suits were filed in the Supreme Court of the District of Columbia for appellants to test the constitutionality of the act of April 26, 1906, and evidently realizing that that court had no jurisdiction Congress was memoralized on their behalf, which resulted in the jurisdictional act being passed referring the question to the court. The full-blood Indians knew nothing of these representations. They are in favor of the restrictive legislation, it is for their protection and they assent to it. Without their knowledge this suit was instituted, and against their will it is maintained. And in their own names! Its effect will be to bring about their own undoing. To add to their injury, appellants have had incorporated in the jurisdictional act a provision authorizing them to employ attorneys for their own financial destruction, and if successful they are to be paid from the funds of these full-blood Indians. This provision doubtless accounts in part for the insistence of appellants in instituting this suit and protesting so vigorously against the intervention of the Cherokee Nation, as we have already shown that appellants are only nominal parties and otherwise can have no personal interest in maintaining this suit unless interested with those who have purchased restricted allotments and now desire to have their purchases ratified by this court. We refer to the 16th finding of the Court of Claims, where it was found that "suits have been brought by the United States embracing 25,338 transactions in the United States courts in the State of Oklahoma to cancel said deeds, contracts, and mortgages, upon the ground that they are a cloud upon the titles of such Indians to their allotments" (Rec., p. 28).

Conclusion.

While it is true that the only part of the Cherokee Nation pecuniarily interested in the result of this case are the full-bloods, it is equally true that the Cherokee Nation is vitally interested in seeing that justice is done to a large class of its citizens, and that they shall not become paupers and a charge upon the Cherokee Nation, the State, or the Government of the United States; and to that end, with the permission of the court below, it has filed a petition of intervention in their behalf and participated in the argument of the case in the Court of Claims.

As matters now stand the full-blood Cherokees desire the restrictions to remain upon their lands, and in this they are backed up by the Cherokee government. Whenever the restrictions have been removed from the allotments of individual full-bloods, it has resulted in the loss of their lands, and, owing to the wholesale violations of the prohibition upon alienation by designing persons, whenever their restrictions shall have been entirely removed, practically all that now remains to them will be lost. Now, shall this be done against the will of the interested parties upon the suit of two nominal plaintiffs who have practically no interest in the subject-matter, and whose motives are certainly not the advancement of the welfare of the Indians?

Should it become necessary in carrying out the duty of protection, undertaken at the inception of this Government, we believe the courts should rise above the mere technicalities of the law and decide upon the higher plane of right and justice. This view appears to have been taken by the Chief Justice of the Court of Claims in delivering the opinion of the court, where he says in conclusion (Rec., p. 40):

> It is a just and wise exercise of power, and rises above technicalities. The protection of property against alienation and incumbrance by those incompetent to appreciate the responsibilities of ownership, and, therefore, unable to resist designing men, is es-

sential to the welfare of society, and, therefore, not subversive of the Constitution, but is in furtherance of its purpose to establish justice, insure domestic tranquillity, and to promote the general welfare. Therefore we may concede that if the claimants were separated from their tribe and were *sui juris* and competent to manage their own affairs the acts extending the restrictions upon the lands of the full-blood Indians might well be held a discrimination among the members of the tribe and an interference with the property rights of citizens of the United States, and, therefore, obnoxious to the Constitution in the sense that the right of alienation, incumbrance, and leasing of their lands was interrupted and delayed; nevertheless, as the restrictions were imposed for their manifest benefit, *i. e.*, that they might have the continued possession, ownership, and consequent enjoyment of their lands until such time as the Government was satisfied they were competent to repel designing men and manage their own affairs, we must hold the several acts valid and effective to accomplish the purpose for which they were enacted.

The court's attention is invited to another important fact. The restricted lands are exempt from taxation while the alienable lands are taxable and subject to civil burdens (Rec., p. 32). This provision alone is of incalculable value to these Indians whose property neither personal nor real was ever before taxable. To tax it means its confiscation as every one familiar with Indian history knows.

Finally substantial justice would seem to require that the validity of sections 19, 20, and 22 of the act of April 26, 1906, should be sustained by the court upon the broad ground of the plenary power of Congress over the lands and other property of tribal Indians.

WILLIAM W. HASTINGS,
National Attorney for the Cherokee Nation.

Office Supreme Court, U. S.
FILED.
NOV 30 1910
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 331.

WILLIAM BROWN AND LEVI B. GRITZ, APPELLANTS,

vs.

THE UNITED STATES.

SUGGESTIONS AMICUS CURIÆ MADE UPON REQUEST OF CERTAIN FULL-BLOOD CHOCTAW AND CHICKASAW ALLOTTEES.

S. T. BLEDSOE.
EVANS BROWNE.

In the Supreme Court

of the

United States

WILLIAM BROWN
AND
LEVI B. GRITZ,
Appellants,

vs.

THE UNITED STATES.

No

SUGGESTIONS AMICUS CURIAE MADE UPON REQUEST OF CERTAIN FULL BLOOD CHOCTAW AND CHICKASAW ALLOTTEES.

STATEMENT.

On the 26th day of April, 1906, the President approved an Act entitled, "An act to provide for the final disposition of the affairs of the five civilized tribes in the Indian Territory, and for other purposes." (34 Stat. 137.) Sections 19 and 22 of said Act are as follows:

Section 19:

"That no full blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole Tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restrictions shall, prior to the expiration of said period, be removed by act of Congress, and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: and Provided, further: That such full blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: Provided, further, that conveyances heretofore made by members of any of the five civilized tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove pro-

vided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions be and the same is hereby declared void: Provided further, that all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation, as long as the title remains in the original allottee."

Section 22:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

Serious doubt having been expressed at the time of the passage of the Act of April 26, 1906, as to the constitutionality of section nineteen,

and its constitutionality thereafter being challenged, Congress by a provision inserted in the Indian Appropriation Bill approved March 1, 1907, (34 Stat. 1028) authorized William Brown and Levi B. Gritz, for themselves and other Cherokee citizens having like interests to institute suit in the Court of Claims to determine the validity of any acts of Congress passed since July 1st, 1902, in so far as such acts might be deemed to increase or extend restrictions upon alienation, encumbrance or right to lease allotments of Cherokee citizens, etc.

The legislation, the constitutionality of which is involved in this proceeding, is applicable not alone to Cherokee allottees, but to the allottees of all of the Five Civilized Tribes. Counsel presenting this brief does so on behalf of a number of full-blood allottees of the Choctaw and Chickasaw Nations who occupy positions therein similar to that occupied by William Brown and Levi B. Gritz in the Cherokee Nation. These full-blood Choctaw and Chickasaw allottees insist that the Act is unconstitutional and violative of their right to control and dispose of their property.

We have not had an opportunity to examine the briefs filed either on behalf of the appellants or on behalf of the United States. We regard the position of the full-blood Choctaw and Chickasaw allottees as substantially identical, so far as the application and the validity of the statutes in question are involved, to the Cherokee full-blood allottees.

We deem it necessary to a proper understanding o four contentions that we present a short summary of the treaties and agreements entered into between the United States and the Choctaw and Chickasaw Nations, relating to the acquiring of title to the lands involved and their allotment in severalty among the members of said tribes.

In 1830 the Choctaws, who then resided east of the Mississippi River, entered into a treaty with the United States whereby the United States agreed that they would "cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River in fee simple to them and their descendants to inure to them while they shall exist as a Nation and live upon it." (7th Stat. 333).

In 1837 the Chickasaws by agreement with the Choctaws approved by the United States, were assigned a district in the Choctaw Nation, with rights equal to those of the Choctaws. (11th Stat. 57.)

In 1855 another treaty was entered into between the United States and the Choctaws and Chickasaws in which it was agreed:

> "* * * pursuant to the Act of Congress of May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits to the members of the Choctaw and Chickasaw Tribes, their heirs and successors, to be held in common; so that each and every member of either Tribe shall have an equal, undivid-

ed interest in the whole; Provided, however, that no part thereof shall ever be sold without the consent of both tribes; and that said land shall revert to the United States if said Indians and their heirs become extinct or abandon the same." (11th Statutes at large 611.)

In 1866 another treaty was entered into between the United States and the Choctaws and Chickasaw Tribes reviving and confirming the grants made in the treaties of 1830 and 1855. (14th. Stat. 769.)

The treaty of 1866 recites that it is believed "that the holding of said lands in severalty will promote the general civilization of said Nations and tend to advance their permanent welfare and the best interests of their individual members, * * * " (Art. IX. Treaty 1866). This treaty provided an elaborate scheme for the allotment in severalty of the tribal lands among the Indians. Section 33 provided that the lands selected in allotment should thereafter be held in severalty and the unselected land should be the common property of the Choctaw and Chickasaw Nations in their corporate capacities, subject to the joint control of their legislative authorities. The scheme of allotment as provided for in this treaty was not accomplished. The Choctaws and Chickasaws, as well as others of the Five Civilized Tribes, remained in possession of the tribal property and maintained tribal governments, modeled after the state governments. These governments had their legislative, execu-

tive and judicial departments. Laws were enacted, revenue collected, and schools maintained.

This condition of affairs continued to exist without further effort to allot the lands of said tribes until March 3, 1893. On that date the President approved an Act providing for the appointment of Commissioners to enter the negotiations with the Cherokee, Choctaw, Chickasaw, Muskogee (Creek) and Seminole Nations for the purpose of the "extinguishment of the national or tribal title to any lands within that territory, now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by allotment or division of the same in severalty among the Indians of said tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations or tribes aforesaid or each of them with the United States, with a view to such an adjustment on the basis of equity and justice as may be with the consent of such nations or tribes or Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a state or states of the Union, which shall embrace the lands within said Indian Territory."

Section 15 of said Act also contained the following provision:

> "The consent of the United States is hereby given to the allotment of lands in severalty, not exceeding one hundred sixty acres to any one individual within the limits

> of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, or Seminoles, and upon such allotment the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. * * * and upon the allotment of such lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease."

This legislation was enacted after a special investigation instituted and conducted by committees of Congress. The Commission thus created was duly appointed, organized, visited the Indian Territory and entered into negotiations with the various tribes and from time to time reported the progress of its work to the Secretary of the Interior and to the President of the United States. The authority of the Commission was enlarged from time to time and particularly by the acts of June 10, 1896 (29 Stat. 339), and of June 7, 1897 (30 Stat. 83).

On April 27th, 1897, these Commissioners on behalf of the United States entered into an allotment agreement with the Commissioners acting for and on behalf of the Choctaw and Chickasaw Tribes of Indians, which agreement received the approval of Congress as Section 29 of the Act of June 28, 1898 (30 Stat. 495). This agreement is known as the "Atoka Agreement" and was ratified by the Choctaws and Chickasaws. However, no allotments were made under its provisions. Prior to the beginning of allotment thereunder another and subsequent agreement was entered into and ratified by both the

United States and the Choctaws and Chickasaws. This agreement is known as "The Choctaw-Chickasaw Supplemental Agreement." The Act of Congress containing and confirming this agreement was approved July 1st, 1902 (32 Stat. 641), and ratified by the Choctaws and Chickasaws, September 25, 1902. The provisions of said agreement providing for the allotment of the lands of the Choctaw and Chickasaw Tribes among the members thereof, imposing restrictions upon alienation are found in Sections eleven to sixteen, inclusive, and section twenty-two, which sections are as follows:

Section 11:

"There shall be allotted to each member of the Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable lands of the Choctaw and Chickasaw Nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allottable land of the Choctaw and Chickasaw nations, to conform, as nearly as may be, to the areas and boundaries established by the government survey, which land may be selected by each allottee so as to include his improvements. For the purpose of making allotments and designating homesteads hereunder, the forty-acre or quarter-quarter subdivisions established by the government survey may be dealt with as if further subdivid-

ed into four equal parts in the usual manner, thus making the smallest legal subdivision ten acres, or a quarter of a quarter of a quarter of a section.

Section 12:

"Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead."

Section 13:

"The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment."

Section 14:

"When allotments as herein provided have been made to all citizens and freedman, the residue of lands not hereing reserved or otherwise disposed of, if any there be, shall be sold at public auction under rules and regulations and on terms to be prescribed by the Secretary of the Interior, and so much of the proceeds as may be necessary for equalizing allotments shall be used for that purpose, and the balance shall be paid into the Treasury of the United

States to the credit of the Choctaws and Chickasaws and distributed per capita as other funds of the tribes."

Section 15:

"Lands allotted to members and freedman shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold as herein provided."

Section 16:

"All lands allotted to members of said tribes, except such lands as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: one-fourth in acreage in one year; one-fourth in acreage in three years; and the balance in five years; in each case from date of patent: Provided, that such lands shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value.

Section 22:

"If any person whose name appears upon the rolls, prepared as herein provided, shall have died intestate subsequent to the ratification of this agreement and before receiving his allotment of land, the lands to which such person would have been entitled, if living, shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs

according to the laws of descent and distribution as provided in chapter forty-nine of of Mansfield's Digest of the Statutes of Arkansas: Provided, that the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and practicable time, the Commission to the Five Civilized Tribes shall designate the lands thus to be allotted."

Patents were issued and recorded pursuant to sections 65 and 66 of this agreement. It will be observed under the provisions of this agreement, the homestead of the allottee was inalienable during his lifetime, not to exceed twenty-one years. The homestead of the freedman was likewise inalienable during the lifetime of the allottee, not to exceed twnty-one years. Lands other than the homestead of the allottee were alienable after issuannce of patent, one-fourth in acreage in one year, one-fourth in three years, and the balance in five years. No restrictions upon alienation were imposed upon the land selected under section 22 in the name of the allottee, after his death, but such land descended to the heirs of the allottee under the laws of descent and distribution of Mansfield's Digest of the Statutes of Arkansas.

In the meantime and on March 3, 1901, the President approved an Act of Congress declaring every Indian in the Indian Territory to be a citizen of the United States with all the rights, privileges and immunities of such. (31 Stat. 1447.)

Section 19 of the Act of April 26, 1906, Extending Restrictions Upon the Right of Alienation by Full-blood Allottees of the Five Civilized Tribes of Their Allotments for a Period of 25 Years Is violative of the Fifth Amendment to the Federal Constitution and Void.

Before proceeding with the discussion of the questions involved, we desire to call the court's attention, briefly, to the distinction between the Five Civilized Tribes and Reservation Indians, both from the standpoint of congressional legislation and civilization and enlghtenment. The Choctaws, Chickasaws, Cherokees and Creeks, from the time of their removal west of the Mississippi, and until changed by legislation in recent years, curtailing their powers, maintained governments patterned after those of the states. Each nation has had its constitution, its chief executive, its legislative bodies and judiciary. Each has levied and collected its own taxes, conducted its public schools and otherwise exercised all the functions of an independent government.

The members of these tribes are enlightened, progressive, and, in the main as capable of caring for their individual interest as is the average citizen of the United States. They are not roving, ignorant, uncouth and savage, incapable and irresponsible, though such is some times charged to be the fact. This court, as has the Circuit Court of Appeals for the Eighth Circuit, has given to the judgment of the courts of these

tribes the same faith and credit as is given to the judgments of the courts of the states. Prior to the enactment of the laws hereinbefore referred to, providing for the allotment in severalty of the lands of these tribes and conferring upon the members thereof citizenship in the United States Congress has sent its committees into the Indian Territory and had made a careful and thorough investigation and arrived at the conclusion, no doubt, that the members of these tribes were as competent to take care of themselves as are other citizens of the United States. Because of the fact that these tribes held title to the land in fee simple and were really what Congress styled them in its legislation, "The Five Civilized Tribes," Congress deemed a disposition of their affairs of such importance that it created a special commission and delegated to that commission the authority to negotiate and enter into agreements with these tribes for the allotment in severalty of the tribal lands.

This commission was created by Act of Congress, approved March 1st, 1893 (27 Stat. 645), which gave the consent of the United States to the allotment in severalty of the lands of the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles, and gave to the commission to use as an argument in favor of allotment, the declaration that "upon such allotments the individual to whom the same may be allotted shall be deemed to be, in all respects, citizens of the United States." The word **all** was evidently inserted for

some purpose. The declaration was not that the allottee shall be deemed in some respects a citizen of the United States or shall have in some respects the rights of a citizen of the United States, but that he shall be deemed to be in all respects a citizen of the United States.

It will be observed, therefore, that by the very statute creating the commission and authorizing the allotment in severalty, it was provided that every Indian received an allotment should be deemed in all respects a citizen of the United States and that upon allotment the reversionary interests of the United States in and to the lands so allotted should be relinquished and should cease.

On the 3d day of March, 1901, the President approved an act to amend Section 6 of Chapter 119 of the United States Statutes at Large, numbered 24, page 390, as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that eSction 6, Chapter 119, United Statutes at Large, numbered 24, page 390, is hereby amended as follows, to-wit: After the words 'civilized life,' in line 13 of said Section 6, insert the words 'and every Indian in the Indian Territory.'" (31 Stat. 1447.)

The section, as amended, reads in part as follows:

> "That every Indian in the Indian Territory is hereby declared to be a citizen of the United States and is entitled to all the

rights, privileges and immunities of such citizens, whether such Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affectng the right of any such Indian to tribal or other property."

The report of the Committee on Indian Affairs, of the Senate, in support of this bill, being report No. 2483, made to the 56th Congress, second session, on the 28th day of February, 1901, and ordered to be printed, is reproduced as Appendix A at the conclusion of this brief.

This report contained some of the reasons why the committee advised the enactment of the law. The purpose, according to the report of the committee, was that every Indian in the Indian Territory should "at once be put upon a lawful and equal footing with the great population with whom they are now intermingled."

Citizenship had been promised in 1893 to each and every member of the Five Civilized Tribes who would accept an allotment in severalty. The promise was, as to Choctaws and Chickasaws carried out before allotment actually began. In other words, they were made citizens of the United States with all the rights, privileges and immunities of such in 1901, although the allotment of the lands of the Choctaws and Chickasaws was not begun until 1902.

The Choctaw - Chickasaw Supplemental Agreement was adopted after the approval of the Act of March 3rd, 1901, conferring national citizenship upon every Indian in the Indian Territory.

Under the provisions of the Supplemental Agreement no distinction whatsoever was made on account of the quantum of Indian blood possessed by the allottee. The extent of restrictions upon alienation was in no way dependent thereon. Under the Choctaw-Chickasaw Supplemental Agreement above quoted, the surplus allotment of all members of the tribe was made alienable after issuance of patent as follows:

One-fourth in acreage in one year, one-fourth in acreage in three years and the balance in five years.

Four years having elapsed since the beginning of allotment before the approval of the Act of April 26, 1906, there were many of the full-bloods whose surplus allotment had, in part at least, become alienable under the provisions of said agreement.

The provisions of Section 19, April 26, 1906, not only undertake to prohibit the alienation for a period of twenty-five years of those lands which were then subject to a short period of restriction upon alienation, but sought to prohibit the alienation for a period of twenty-five years of that part of the surplus allotment of full-blood

Choctaws and Chickasaws which had become alienable under the provisions of the Choctaw-Chickasaw Supplemental Agreement.

It is respectfully insisted that it was not within the power of Congress to so impose restrictions upon alienation of the lands which were at the time free from restrictions upon alienation or to extend for a period of twenty-five years restrictions upon alienation which would terminate in any event in five years.

We believe that when the members of the Five Civilized Tribes were made citizens of the United States, in 1901, that the guardianship of the United States theretofore existing ceased.

That upon the selection of an allotment and its segregation from tribal property and conversion into individual property, the control of the federal government over the lands so selected in allotment, wholly ceased. In other words, the individual allotment ceased to be tribal property and became individual property, and the reversionary interest of the United States and passed to the allottee. The individual allottee had ceased to be a ward of the government and had become a citizen thereof.

By what stretch of authority could the federal government prohibit such individual citizen from alienating his individual property for a period of twenty-five years? May justification be found for this act in the fact that the allottee is of Indian blood? Is an allottee any less a citi-

zen of the United States because he is of Indian descent? Are his rights, privileges and immunities as a citizen of the United States rendered less sacred because of his Indian parentage? If so, what quantum of Indian blood is necessary to destroy the rights of citizenship? Will the fact that the allottee is 1-64, 1-32, 1-16 or 1-4 or 1-2 Indian blood be sufficient? Or is it the full-blood only whose rights may be thus impaired? We believe that this interrogatory may be best answered by quotation from the opinion of this court in the matter of Heff, 197 U. S. 488, in the following language:

> "Can it be that because one has Indian and only Indian blood in his veins he is to be forever one of a special class over whom the general government may, in its discretion, assume the rights of guardianship which it once abandoned, and this whether the state or the individual himself consents We think the reach to which this argument goes demonstrates that it is unsound.

The Five Civilized Tribes were not located within a state at the time of the approval of the act of April 26th, 1906. It was, therefore, not necessary to secure the consent of the state, but it was none the less necessary to secure the consent of the individual whose right to contract was impaired and whose property was taken thereby without due process of law.

This court also **(in re Heff, Supra.)** made reference to the Act of March 3rd, 1893 (27 Stat 645), supra, in the following language:

"We make these references to recent treaties, not with a view to determining the rights created thereby, but simply illustrative of the proposition that the policy of the government has changed and an effort is being made to relieve some of the Indians from their tutelage **and endow them with the full rights of citizenship, thus terminating between them and the United States the relation of guardian and ward.**"

(The black type is ours.)

We respectfully submit that the interpretation thus given, of the scope and purpose of the Act of March 3, 1893, which has its consummation in the Act of March 1st, 1901, before completion of allotment as to some of the allottees of the Five Civilized Tribes, is undoubtedly the correct interpretation of the same and is applicable to the case at bar. Without quoting at length therefrom this court's attention is called to the splendid exposition of the law upon this subject found in the following cases:

Ex Parte Viles, 139 Fed 70.

United State vs. Hall, 171 Fed., 214.

United States vs. Dooly, et al., 151 Fed. 697.

United States vs. Saunders, 96 Fed., 268.

United States vs. Kopp, 110 Fed., 160.

United States vs. Auger, 153 Fed., 671.

Ex Parte Savage, 158 Fed., 205.

United States vs. Boss, 160 Fed., 132.

To summarize: The Choctaw and Chickasaw Nations held the title to their tribal domain by a qualified fee, the possibility of reversion only being vested in the United States.

Cherokee Nation vs. Railroad Co., 33 Fed., 900.

The Cherokee Trust Funds, 117 U. S., 288.

Cherokee Nation vs. Southern Kans. Ry. Co., 135 U. S., 656.

The tribal lands so held have been allotted in severalty pursuant to the Supplemental Agreement, allotment certificates and patents issued therefor and the allottees have been made citizens of the United States.

Some of the lands so allotted are subject to restrictions upon alienation. Such restrictions were imposed for the protection of the allottees and vested no interest whatever in the United States, in reversion or otherwise. Such restrictions upon alienation do not debase the title received by the allottees below that of a fee simple estate.

Libby vs. Clark, 118 U. S., 255.

Scrimscher vs. Stockton, 183 U. S., 290, 299.

The conditions existing when the Act of April 26th, 1906, became effective, so far as involved in this litigation, were as follows:

The allottees were citizens of the United States with all the rights, privileges and immunities of such. The lands involved had been segregated from the tribal domain, allotted and patented to the allottee, subject to certain restrictions upon alienation imposed by agreement between the tribal authorities and the United States.

The legislation in controversy was enacted without the consent of the individual or the tribe. We say without the consent of the tribe, not because we deem it important, or that the tribe could have consented for the individual citizen of the United States as to his individual property, but because it has sometimes been contended that tribal consent might suffice in lieu of individual consent. The decisions of this and of other courts determining when the rights of citizenship attached and the wardship ceases are, as we contend, in point.

In so far as these cases determine whether the right to prosecute for the sale of intoxicating liquors to an Indian exists, they are not necessarily in point. There is no constitutional guaranty that any citizen of the United States may buy, sell, barter, or drink intoxicating liquors.

There is a constitutional guaranty that no person shall be deprived of his property without due process of law. A decision, therefore, holding that jurisdiction exists under the Act of 1897 to prosecute for the sale of intoxicating liquors to a citizen of the United States of In-

dian descent does not in the least militate against the contention that Section 19, of Act of April 26th, 1906, constitutes a taking of the property of full-blood allottees without due process of law.

The mere ownership of an interest by a full-blood allottee of the Five Civilized Tribes in the undivided tribal property certainly does not render his individual property subject to be dealt with at the will of Congress without regard to constitutional restraint. Neither would his membership in the tribe divest his individual property of constitutional protection. Membership in the tribe and the authority of the federal government over the tribal property is wholly separate and distinct from citizenship in the United States and control of individual property.

It is contended that the conferring of citizenship did not impair the right of the federal government to deal with tribal property. It might be asserted with much more reason that membership in the tribe and interest in undivided tribal property or even the continuance of tribal government in no wise impair the rights, privileges and immunities of citizenship as applied to the individual property, nor lessens the authority and control of the allottee over his individual property nor increases the power of Congress in dealing therewith.

The management, control and disposition of the individual property of the full-blood allottee

is in no wise affected by his membership in the tribe nor his interest in the undivided trbal property.

Suppose that in the interim after the selection of an allotment and before the approval of the Act of April 26, 1906, a full-blood allottee of the Choctaw or Chickasaw tribes had exchanged one-fourth or one-half of his surplus allotment, which had become alienable under the provisions of the Choctaw-Chickasaw Supplemental Agreement for a like amount of land with another allottee whose lands were alienable, or with some one residing in Texas, Kansas or some other state. Could Congress have said that the lands thus acquired in exchange should not be alienated for the period of twenty-five years? Would it not have had just as much constitutional authority to do so as to say that allotted lands should not be alienated for twenty-five years? Would not Congress have just as much right to prohibit the alienation of land acquired by purchase, inheritance or devise as it would to prohibit the alienation of that received in allotment?

Some of the Cherokees did not have a full allotment of land and are permitted to take money in lieu thereof. Suppose one of these Cherokee allottees should select a homestead upon the public lands of the United States and receive a patent therefor. Could Congress, after his title was perfected, by the issuance and recording of patent in the land office, enact that

the lands so selected should become and remain inalienable for a period of twenty-five years?

We most respectfully contend that any legislation of the character above indicated would fall within the condemnation of the fifth amendment to the constitution.

It is unnecessary to enter into discussion of whether or not the right to lease, encumber or dispose of allotted lands is property.

That such rights come within the elementary definition of property, we believe, is beyond controversy.

That the prohibition against alienation for the period of twenty-five years is a taking of property within the meaning of all of the adjudged cases upon this subject we regard as also too well settled to need the support of a citation of authorities.

That the taking is without due process of law is clearly established by the fact that it is done by legislative action, without the consent of the allottees and without compensation.

The only theory upon which this legislation can be sustained is that Congress has the right to take the property of the full-blood allottee without due process of law and without compensation because such allottee is of "Indian" and "only Indian blood."

Cases Cited in Support of the Constitutionality of the Act by the Court of Claims Are Not Applicable.

The first case cited by the Court of Claims in support of its contention is that of **Lone Wolfe vs. Hitchcock,** 187 U. S., 553-567, which

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was a suit to restrain the allotment of lands to members of the Kiowa and Comanche Tribes of Indians on the ground that the Secretary was proceeding under an Act of Congress in violation of a previous treaty made with the Tribes, providing that their lands should not be allotted until a majority of all of the members of the Tribes had voted therefor. It was further insisted that a majority of the Tribes had not so voted and that the United States had amended the treaty after its ratification by the Indians without their knowledge or consent.

The Kiowas and Comanches were not located in the Indian Territory, were not citizens of the United States, and the property was tribal property. The relief sought by the Indians was denied. The authority of the United States to so deal with the matter in controversy was by the opinion of the Court especially limited to tribal lands, in the following paragraph of the opinion (567):

> "The Indians who had not been fully emancipated from the control and protection of the United States are subject, at least, so far as the tribal lands were concerned, to be controlled by direct legislation of Congress, is also declared in **Choctaw Nation vs. United States,** 119 U. S., 1, 27, and **Stephens vs. Cherokee Nation,** 174 U. S., 445, 483."

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Therefore, in the case of **Lone Wolf vs. Hitchcock,** neither **citizens** of the United States nor their individual property was being dealt with.

The next case cited is that of **Cherokee Nation vs. Hitchcock,** 187 U. S., 294, which involved the authority of the Secretary of the Interior to lease **tribal lands** of the Cherokee Nation pursuant to and in accordance with an Act of Congress. The authority of the Secretary to make such lease was sustained upon the ground that the land of the Cherokee Nation was **tribal property,** held by the Nation in its tribal capacity, and that Congress is vested with authority to take measures to make the tribal property productive and to secure therefrom an income for the benefit of the tribes. In this instance Congress was simply dealing with tribal relations and tribal property, and not with an individual citizen of the United States and his individual property.

Another case cited by the Court of Claims in support of its contention is that of **United States vs. Rickert,** 188 U. S., 432, being a suit instituted in the name of the United States to restrain the collection of state taxes upon the improvements located upon lands allotted under the general allotment act of 1887, and on certain persona lproperty furnished by the United States and used for the cultivation of such lands by the allottees. The case turned principally upon the rights acquired by the allottee under the general allotment act

and the obligations assumed by the United States. A quotation from the opinion, found in the decision of the Court of Claims, is as follows:

> "The granting of citizenship does not affect the acquiring of title to land allotted to the Indians nor is a restriction against alienation inconsistent with citizenship."

This court in the Rickert case was speaking about restrictions upon alienation imposed in the Act under which the allotments were made, and not restrictions after citizenship had been granted and an unconditional grant in fee acquired.

Another case cited by the Court of Claims in support of its conclusions is that of **United States vs. Thurston County, Nebraska,** 143 Federal, 287. This was a suit instituted by the United States to enjoin Thurston County, Nebraska, from collecting taxes on certain moneys deposited in a bank by the order of the Secretary of the Interior. These moneys were proceeds of the sales of inherited lands as to which the United States had obligated itself to hold "for a period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his death, of his heirs." The heirs had been permitted to sell on condition that the proceeds of the sale should be deposited to their respective individual credits in a bank selected by the Commissioner of Indian Affairs, subject to their respective checks, not to exceed ten dollars in any one

month. In no instance, had the twenty-five years, during which the United States had undertaken to hold the allotments expired. It was held that these trust funds stood in the same relation as the lands for which they were sold, and were not subject to taxation by the state. We quote as follows from the opinion:

> "Allotted lands were held by the United States for the benefit of those to whom they were assigned and their heirs under the acts of August 7, 1882, and February 18, 1887. The proceeds of the sales of these lands have been lawfully substituted for the lands themselves by the trustee. The substitutes partook of the nature of the originals and stood charged with the same trust."

It is not believed that this decision, even remotely, sustains the opinion of the Court of Claims.

Another case cited by the Court of Claims in support of its decision is that of **Dick vs. United States**, 208 U. S., 340 and 353, to the point that "the authority of the state can not be so exerted as to impair the power of Congress to regulate commerce with the Indian tribes."

That case involved a prosecution for violation of the Act of 1892, prohibiting the sale of intoxicating liquors to Indians. In reference thereto the Court said:

> "If this case depended alone upon the federal liquor statute forbidding the introduction of intoxicating liquors into the Indian

country, we would feel obliged to adjudge that the trial court erred in not directing a verdict for the defendant; for that statute, when enacted, did not intend by the words, 'Indian country,' to embrace any body of territory in which at the time, the Indian title had been extinguished, and over which and over the inhabitants of which (as was the case of Culdesac) the jurisdiction of the state, for all purposes of government, was full and complete. **Bates vs. Clark,** 95 U. S., 204; **Ex Parte Crow Dog,** 109 U. S., 556, 561.

"But this case does not depend upon the construction of the federal liquor statute, considered alone. That statute must be interpreted in connection with the agreement of 1893 between the United States and the Nez Perce Indians. By that agreement, as we have seen, the United States stipulated that the lands ceded by the Nez Perce Indians, and those retained as well as those allotted to the Indians (which embraced all the lands in the original Reservation), should be subject, for the limited period of twenty-five years, to all federal laws prohibiting the introduction of intoxicants into the Indian Country."

This case, therefore, involved the question of jurisdiction to punish for a crime under the peculiar provisions of the agreement between the United States and the Nez Perce Indians, entered into long before the admission of the state. It involved no question of the taking of property without due process of law.

It is believed that all of the cases that will be cited in support of the constitutionality of

this legislation will be of litigation founded upon trust patents relating to the control of tribal property and on the question of jurisdiction to prosecute for the sale of intoxicating liquors to Indians.

The case of **United States vs. Celestine,** 215 U. S., 278, is sometimes used to support conclusions of the character of those found in the judgment of the Court of Claims. The distinction suggested in the Celestine case with reference to the fact that in that particular case the Indian had not, by the terms of the allotment act, been remitted to the jurisdiction of the state, would be immaterial in the case at bar. While it might be material upon a question of jurisdiction of the Courts of the United States, it would not be material upon the question of the protection of the fifth amendment to the constitution. In other words, a citizen of the United States has the protection of the fifth amendment without regard to his state citizenship. In the case of **United States vs. Celestine, supra,** this Court also noted the purpose of Congress as expressed in the Act of May 8, 1906, (34 Stat. 102), extending the trust period of allottees under the Act of 1887. The Indians in the Indian Territory were specifically exempted from the provisions of said Act, under the conditions and for the reasons set forth in Appendix B hereof.

Reservations in the Enabling Act.

The Enabling Act providing for the admission of the State of Oklahoma into the Union having been approved June 16, 1906, is referred to in the opinion of the Court of Claims as throwing some light upon the authority of Congress in enacting the Act of April 26, 1906, and the effect and purpose thereof. Said Enabling Act contained the following provision:

> "That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: Provided, That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territory (so long as such rights shall remain unextinguished) or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed." (34 Stat., 267.)

Is this not simply a reservation to deal with the Indians touching their tribal rights and tribal property? That such is the intention is indicated by the provision, "by treaties, agreement, law or otherwise. This section makes no provision for continuing in force any particular

dissolution of the marriage contract between members of these tribes is controlled by the laws of the state; the validity of the personal obligations of the members of these tribes is determined by the laws of the state; they are tried and punished for violation of the laws of the state; a substantial portion of their lands bear the burdens of taxation; all of which matters were subjects of Congressional legislation prior to statehood.

If the Enabling Act is to be interpreted as reserving to the federal government the authority to legislate with reference to the members of the Five Civilized Tribes upon all the matters above set out, then the provision is violative of the federal constitution, because it would deprive the State of Oklahoma of the power to legislate with reference to all of those matters, committed by the constitution to the states. Oklahoma, under such requirements, instead of having been admitted upon an equal footing with the other states of the Union, would be reduced in her sovereign authority below the standard of an ordinary dependency of the crown governments.

The constitution of the United States does not contemplate or tolerate a union of unequal states.

The Supreme Court of the United States in the case of **Pollard's Lessee vs. Hagan,** 3 Howard, 391 and 409, uses the following language:

"When Alabama was admitted into the Union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands. **And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty or eminent domain, within the limits of a state, or elsewhere, except in the cases in which it is expressly granted.** (Black type is ours.)

"The right of Alabama and every other new state, to exercise all the powers of government, which belongs to, and may be exercised by the original states of the Union, must be admitted, and remain unquestioned, except so far as they are temporarily deprived of control over the public lands."

"The declaration, therefore, contained in the compact entered into between them when Alabama was admitted into the Union, 'that all navigable waters within said state shall forever remain public highways, free to the citizens of said state and of the

this constitutional authority in Congress be construed as to invest Congress as an agent with powers to impose other conditions upon the new member which the constitution has not prescribed? And, if so, does the new state enter the Union shorn of its power protanto by the agent authorized to open its doors to the new commonwealth without any such condition? The better opinion would clearly be that Congress could not impose as an obligation upon a state at the time of its admission into the Union such a restriction as it had no original power to enact or enforce."

Mr. Cooley, in his Principles of Constitutional Law, page 195, says:

> "Other conditions have been imposed and a common requirement upon the admission of a state is that it shall waive all right to impose taxes on the land of the United States. Some of these conditions are beyond question irrevocable, by the states. Such, for example, are those last mentioned, which are irrevocable because they constitute articles of compact between the state and Union, which would render the taxation void. Such also would be a condition respecting boundary, as in the case of Michigan. But when a state comes into the Union, it is received on an equal footing with the original states and with all their rights and privileges."

The authority of the federal government is limited to those matters delegated to it by the constitution. The exercise of the ordinary po-

lice power or the discharge of the duties of municipal government within the state are not among the delegated authorities. An agreement entered into by the United States and a state by which the state undertook to delegate to the federal government functions not delegated by the constitution but reserved to the states and the people of the states respectively, would be violative of the federal constitution and of no effect. Congress, largely composed of lawyers as it is, kne wsuch to be the case when the Oklahoma Enabling Act was passed. Congress therefore will not be presumed to have intended to reserve jurisdiction and authority which could not be lawfully exercised within the state.

Ordinarily the matter discussed under this heading would not be appropriate in the consideration of the subject matter in controversy. In view of the fact, however, that the Court of Claims considered the provisions of the Enabling Act as tending to support the constitutionality of the acts involved, we have deemed it not improper to present these views upon the authority of Congress in the premises.

Section 22 of the Act of April 26, 1906, is also violative of the fifth amendment to the federal constitution if construed to extend without limitation restrictions upon alienation of inherited lands, but such is not its proper construction.

Section 22 of the Act of April 26, 1906, specifically provides that the "adult heirs of any

orate opinion interpreting this statute. The Secretary approved this opinion. This was while the matters touching the enactment of the legislation was fresh in the minds of the departmental officials.

The Department of the Interior is always jealous of its authority over the Indian tribes and Indian affairs. That authority is not relinquished except when the department is convinced beyond controversy that it cannot be lawfully asserted. The opinion of the department, therefore, in construing section 22 above quoted against its own authority is the strongest evidence of the fact that such provision would not bear any other construction. The opinion of the Assistant Attorney General as approved by the Secretary is in full as follows:

Department of the Interior.

Office of Assistant Attorney General.
Washington.

January 29, 1907.

24788-1906.

Int. Ter. Div.

The Secretary of the Interior.

Sir: You have submitted the papers relating to the approval of the deed executed under the direction of the United States Court by the curator of the estate of Willis and Richardson Watson, minor, full-blood Choctaw Indians, covering one hundred and twenty acres of land originally allotted to their father, Robinson Watson, saying:

"In view of sections 19, 20 and 22 of the Act of Congress approved April 26th, 1906, (34 Stat. 137), your opinion is requested in the matter."

The land in question being the southeast quarter of the northwest quarter, the southwest quarter of the northwest quarter, the northeast quarter of the northwest quarter of the southwest quarter, the north half of the northeast quarter of the southwest quarter and the northwest quarter of the northwest quarter of the southwest quarter, section 25, T. 5 S., R. 1 E., in the Choctaw Nation, Indian Territory, was allotted Robinson Watson, a Choctaw by blood, as a homestead, May 28th, 1903, and homestead patent executed in his favor was filed for record in the office of the Commission to the Five Civilized Tribes Sept. 18, 1905.

It is alleged in the petition for the sale of these lands that they were set apart to Willis Watson and Richardson Watson as their part of the lands belonging to the estate of their deceased father, Robinson Watson, March 31st, 1906, after due notice thereof, C. D. Wortham, as curator filed in the United States court for the Southern District of the Indian Territory, application to sell said real estate for the education and support of said minors. An order was that day made directing such sale to be made May 12th, 1906, and appraisers were appointed to view and appraise the property. They appraised it for $1,200.00 and the property was sold May 12th, for $1,100. This sale was subsequently approved by the

court and deed executed thereon May 14th, 1906. In view of the provisions of section 22 of the Act of April 26th, 1906, the department has been asked to give its approval to this sale.

In the Act of June 28th, 1898, (30 Stat. 495, Sec. 29), it was provided that each allottee of the Choctaw and Chickasaw Tribes of Indians should select from his allotment a homestead of 160 acres for which he should have a separate patent and which should be inalienable for twenty-one years from date of patent. In the Act of July 1, 1902, (32 Stat. 641), it is provided that each member of said tribes shall at the time of selecting his allotment designate as homestead land equal in value to one hundred and sixty acres of the average allottable lands of the Choctaw and Chickasaw Nation 'which shall be inalienable during the lifetime of the allottee not exceeding twenty-one years from the date of the certificate of allotment, and separate certificates and patent shall issue for said homestead.'

Certificate and patent for the land in question issued to Robinson Watson, as a homestead, and under the terms of this provision of law descended at his death to his heirs, free of any restrictions upon alienation.

The Act of April 28th, 1904, (32 Stat. 573), contains the following provision:

All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation so as to embrace all persons and estates in said territory, whether Indian, freedman, or

otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said territory in the settlement of all estates of decedents, the guardianship of minors and incompetents, whether Indian, freedman or otherwise.

These minors and their lands, held by them free from any restrictions upon alienation, were within the jurisdiction of the United States court as described in this law, and it had, at the time the petition for sale was presented, full authority to entertain the petition and to direct the sale.

You refer to sections 19, 20 and 22 of the Act approved April 26th, 1906, as presumably having significance in connection with this matter. Section 19 provides "that no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restrictions shall, prior to expiration of said period, be removed by acts of Congress." This provision related to allottees and has no bearing on the question here presented. Section 20 refers exclusively to leases and rental contracts and does not effect this case. Section 22 reads as follows:

That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued, for his or her share of the land of the tribe to which

he or she belongs, or belonged, may sell and convey the lands inherited from such decedent; and if there be born, adult and minor heirs of such decedent, then, such minors may join in the sale of such lands by a guardian duly appointed by the proper United States Court of the Indian Territory. And in case of the organization of a state or territory, then by the proper court of the county in which said minor, or minors, may reside, or in which said real estate is situated, upon an order of such court made upon application filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians, are to be subject to the approval by the Secretary of the Interior, under such rules and regulations as he may prescribe.

This section provides the manner in which sales may be made, notwithstanding any restrictions upon alienation, and seems to apply to the heirs of all deceased allottees without regard to quantum of Indian blood. It cannot, however, be held to apply to heirs who received their inheritance freed of all restrictions. There would have been no occasion for this provision or field for its operation if the same provision that relates to homesteads had extended to the other or surplus allotted lands. The provision as to surplus lands of the Choctaws and Chickasaws in the Act of July 1, 1902, supra, is that they may be alienated one-fourth in acreage in one year; one-fourth in three years, and the balance in five years from the date of patent. There is no permissable construction of said section 22, except that

it applies so far as the Choctaws and Chickasaws are concerned to these surplus lands which descend to the heirs burdened with the restrictions upon alienation and not to the homestead which descend to the heirs freed of all such restrictions.

If this is the proper construction of these laws this department has no jurisdiction over the sale of lands thus held by minors freed of restrictions, and no function to perform in connection therewith. Believing that no other construction is permissible, I am of the opinion, and so advise you, that the law does not require any action on your part in this matter.

The papers are returned herewith.

Very respectfully,

FRANK L. CAMPBELL,

Assistant Attorney General.

Approved:

January 29th, 1907.

E. A. Hitchcock.

Secretary.

The statement in this opinion with reference to this Act that "it cannot, however, be held to apply to heirs who receive their inheritance free of all restrictions, is in our judgment, a brief, terse and correct interpretation of said provision.

This construction that the provisions of this act did not extend to heirs who receive their inheritance free of all restrictions was accepted and acted upon by all purchasers of inherited

lands became valuable and on July 20th, 1894, he made another lease of the same land to the defendants for 20 years, for a very materially increased consideration. After the execution of this second lease Congress passed a resolution authorizing the secretary to approve the lease to the defendants if, in his discretion, he deemed it advisable, and shortly afterward the secretary did approve the last lease. By such act the secretary, under congressional authority, sought to reassume control and dominion over the land of this Indian and subject him to the burdens of tribal property. Here was a direct attempt on the part of the government to control the individual land of a purely tribal Indian, to whom lands of his tribe had been segregated. He had dealt with the lands improvidently and the government sought to reach after and draw them back to its protection and control. The Supreme Court, in disposing of the matter, on page 32, said:

> "The title to the strip of land in controversy having been granted by the United States to the elder Chief Moose Dung by the treaty itself, and having descended, upon his death, by the laws, customs, and usages of the tribe, to his eldest son and successor as Chief Moose Dung, the younger, passed by the lease executed by the latter in 1891 to the plaintiffs for the term of that lease; and their rights under that lease could not be divested by any subsequent action of the lessor, or of Congress, or of the Executive De-

partments. The construction of treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty or to affect titles already granted by the treaty itself."

* * * * * * The Congressional resolution of 1894 and the subsequent proceedings in the Department of the Interior must therefore be held to be of no effect upon the rights previously acquired by the plaintiffs by the lease to them from the younger chief."

This case it seems to us, directly denies the power of Congress to impose restrictions where none exists. Upon the same reasoning Congress is without power to add to restrictions already imposed. The one act would be as obnoxious to constitutional provisions as the other.

Under the scheme of allotment in the Five Tribes all the right, title and interest of the United States, the tribe and the remaining members thereof passed to the allottees. That being so, how can the government expect to revive the tribal character of these lands and resubject them to its dominion and control? The title having passed by grant it can never be repealed and there can never thereafter be revived in the United States any vestige of right, title or interest. (**Stevens vs. Smith,** 2 Kan., 238, 245.)

The only way, in the absence of interest in the **res** itself, in which the government can reach these lands, is through its control over tribal af-

fairs, and the lands having passed from that tribal control into individual ownership, every vestige of dominion over them by the government through either of these channels is lost, and when once lost can never be revived.

On June 30th, 1906, the United States Senate, by resolution, selected a committee consisting of five senators to fully investigate the matters connected with the condition of affairs in the Indian Territory, included in the act entitled " An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes, approved April 26th, 1906, and kindred matters."

The committee was directed to make full and complete report, together with their conclusions and recommendations, to the Senate of the United States.

This committee was composed of Senator Clarence D. Clark, of Wyoming, Chairman of Judiciary of the Senate, Senator Chester I. Long, of Kansas; Senator Frank B. Brandegee, of Connecticut; Senator Henry M. Teller, of Colorado, a former Secretary of the Interior, and Senator William A. Clark, of Montana.

The report of the committee affecting the constitutionality of the act in controversy is found in Vol. 1, at page 5 of a publication entitled "Report of select committee to investigate matters connected with the affairs in the Indian Territory, 1906," and is as follows:

"By the Act of March 3, 1901, all Indians in Indian Territory were made citizens of the United States. The Indian tribes had title to these lands by patents from the United States. These lands were occupied in common by the members of the respective tribes. By the Supplemental Agreements made in 1902 these Indians agreed to take their lands in severalty upon condition that they could alienate their allotments within a certain period, which differed in the several tribes. We believe that Congress might shorten this period and permit alienation at an earlier date.

"Congress, by the Act of April 21, 1904, removed the restrictions upon the alienation of all allottees of either of the Five Civilized Tribes who were not of Indian blood, except minors, and except as to homesteads, and provided that restrictions upon the alienation of all other allottees, except minors, and except as to homesteads, might, with the approval of the Secretary of the Interior, be removed upon application to the Indian agent at the Union Agency."

"Section 19 of the Act of April 26th 1906, provides that no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes should have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the approval of that act, unless such restrictions, prior to the expiration of said period, shall be removed by Act of Congress.

"We believe that this last legislation was unwise, injurious to the Indian, and of no validity. Congress, after providing in the Supplemental Agreements that all the lands allotted to the citizens of the different tribes should be alienable within certain periods, could not, without the consent of the Indians, extend the time in which the lands could not be alienated and add to the restrictions imposed by the Original Agreements. The effect of this legislation has already clouded, and, if unrepealed, will continue to cloud th etitle of much land in Indian Territory, and will result in endless litigation.

"It will prevent the Indians from obtaining a fair price for their lands, and has been and will continue to be a fruitful source of dishonest transactions.

"It will not prevent sales being made at the expiration of the period designated in the Supplemental Agreements, and has already resulted in contracts being made for such sales. This provision is generally considered to be invalid and should be repealed."

In the recent case of **Midland Oil Company et al., vs. Turner et al.,** 179 Fed., 74, there was involved the authority of the Secretary of the Interior to permit and approve the assignment of an oil and gas lease without the consent of the lessor. It was apparently assumed by the Secretary that the lessor was still a ward and that he might act without consulting his ward. The opinion was by Judge Hook, speaking for the

Circuit Court of Appeals for the Eighth Circuit. The result of the opinion on this point is correctly summarized in the first paragraph of the syllabus as follows:

> The statutory requirement that leases made by Indian allottees of the Cherokee and other civilized tribes in the Indian Territory should be subject to approval by the Secretary of the Interior before being effective conferred on the Secretary only the power of approval or disapproval and gave him no authority to initiate or make a lease, or to change or ignore its provisions, and his approval of an assignment of a lease, made without the consent of the lessor, in direct violation of its conditions, did not validate such assignment.

Senator Clapp, chairman of the Senate Committee on Indian Affairs, a lawyer of much ability and force and thoroughly conversant with the question, while the legislation here involved was being considered by the Senate, stated his views in reference to the constitutionality thereof in the following language:

> The discussion of the right of alienation and restriction upon alienation have always ignored one basic principle, which the court has not met yet, because it has never been presented to the court. A restriction upon alienation can only rest upon one of two conditions. It must be a limitation placed in the grant at the time of the grant; or it must be a limitation resting in the incapacity of the grantee to transact business, as the incapacity of coverture, infancy or lunacy. If

finds that perhaps a majority of the Cherokees are in favor of the provisions found in section 19 of the Act of April 26th, 1906. There is nothing in the record to ascertain how the court arrived at that conclusion.

The Choctaws and Chickasaws have at all times protested against the authority of the government to impose these additional restrictions. We understand that this protest assumed the form of a resolution which should be found either in the possession of the Commissioner to the Five Civilized Tribes, or Commissioner of Indian Affairs or the Secretary of the Interior. We also understand that it ma ybe found among the files in this cause in the Court of Claims. However this may be, no contention can be made that the Choctaws or Chickasaws ever assented to the provision of this act. If the Cherokees have in any wise assented, to that extent their case differs from that of the Choctaws and Chickasaws.

But, as we have before said, we do not believe that the tribal authorities could consent to the imposition of these restrictions upon the individual allotment so as to bind the allottee.

TRIBAL EXISTENCE.

The existence of a tribal government, if in fact one existed, would not impair or affect the rights, privileges or immunities of citizenship. It is sometimes asserted that any mere tribal existence seriously impairs, if it does not wholly destroy the rights, privileges and immunities of

citizenship. The tribal governments have long ceased to exist for any vital purposes. The so-called tribal officials are not tribal officials in fact; the offices these former tribal officials now fill are the creatures of Congress, and offices are held by virtue of an act of Congress and not by virtue of the will of the tribe or because of the selection by the tribe of such persons to fill such offices. They are in the proper sense federal appointees, absolutely without any governmental authority. Tribal existence formerly consisted of a legislative, an executive and a judicial department and of members and citizens owing allegiance to such government and receiving protection in their person and property therefrom.

To say the least of it, the legislative and judicial departments have been abolished; the enforcemetn of tribal laws in any court has been prohibited; the power of taxation has been absolutely suspended; the protection afforded to the property and members of the tribe is wholly a thing of the past. There is no government for the former members of the tribe to owe allegiance to or acept protection from.

The continued tribal existence of the Kickapoo Tribal organization and its recognition by the federal government was urged as sufficient authority to sustain the jurisdiction of the federal court in re Heff, **supra**. The continued existence of the Red Lake Band of Chippewa Indians and the fact that such band sustained tribal relations with the United States was claimed to justify the action of the department and of

a restatement of the law in a corrected or improved orm. The restatement may be with or without material change. A revision is intended to take the place of the law as previously formulated. By adopting it the legislature says the same thing, in effect, as when a particular section is amended by the words 'so as to read as follows.'

The revision is a substitute; it displaces and repeals the former law as it stood relating to the subjects within its purview. Whatever of the old law is restated in the revision is continued in operation as it may operate in the connection in which it is reenacted.

In **Bartlett vs. King,** Dewey, J., said:

'A subsequent statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must on principles of law, as well as in reason and common sense, operate to repeal the former.'

Though a subsequent statute be not repugnant in all its provisions to a former, yet if it was clearly intended to prescribe the only rule which should govern, it repeals the former statute. Without express words of repeal, a previous statute will be held to be modified by a subsequent one, if the latter was plainly intended to cover the subject embraced by both, and to prescribe the only rules in respect to that subject that are to govern." * * *

"* * * The reasonable inference

from a revision is that the legislature cannot be supposed to have intended that there should be two distinct enactments embracing the same subject matter in force at the same time, and that the new statute, being the most recent expression o the legislative will, must be deemed a substitute for previous enactments, and the only one which is to be regarded as having the force of law. Sec. 155:

> A revising statute embracing antecedent general laws on various subjects and reducing them to one system and one text repels all prior statutes upon the same subjects not included in the body of the revision and not exempted by an express clause. Where one act is framed from another, some parts taken and others omitted; or where there are two acts on the same subject, and a later embraces all the provisions of the first and also new provisions, the later act operates, without any repealing clause, as a repeal of the first."

See also Endlich on Interpretation of Statutes, sections 201 and 202.

In the case of the **District of Columbia vs. Hutton**, 143 U. S., page 26, the rule as stated by Mr. Justice Lamar, in the following language, is:

> "We are not unmindful of the rule that repeals by implication are not favored. But there is another rule of construction equally sound and well settled which we think applies to this case. Stated in the language of

this court in **United States vs. Tymen,** 11 Wall. 88, 92, it is this: 'When there are two acts on the same subject, the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.' See also **Murdock vs. Memphis,** 20 Wall. 590, 617; **Tracy vs. Tuffy,** 134 U. S. 206, 233; **Fisk vs. Henarie,** 142 U. S. 459."

In the case of **The Paquete Habana,** 175 U. S. 685, the Supreme Court of the United States, speaking through Mr. Justice Gray, states the rule in the same language as above quoted.

In the case of **Fisk vs. Henarie,** 142 U. S. 468, Mr. Chief Justice Fuller, speaking for the Supreme Court of the United States again quotes the language used in the above cases, stating that the rule thus expressed was applicable and decisive of the question involved.

The rule is again stated in the same language by Mr. Justice McKenna in the case of **Henrietta Mining and Milling Co. vs. Gardner,** 173 U. S. 128.

The rule is clearly stated by Justice Miller in the case of **Murdock vs. City of Memphis,** 20 Wall. 616, in the following language:

"The Act of 1867 has no repealing clause, nor any express words of appeal. If there is any repeal, therefore, it is one of implication. The differences between the two sections are of two classes; namely, the change or substitution of a few words or phrases in the latter for those used in the former, with very slight, if any, change of meaning, and the omission in the latter of two important provisions found in the former. It will be preceived by this statement that there is no repeal by positive new enactments inconsistent in terms with the old law. It is the words that are wholly omitted in the new statute which constitute the important feature in the questions thus propounded for discussion.

A careful comparison of these two sections (set forth in parallel columns, **supra,** pp. 592-593) can leave no doubt that it was the intention of Congress, by the latter statute, to revise the entire matter to which they both had reference, to make such changes in the laws as it stood as they thought best, and to substitute their will in that regard entirely for the old law upon the subject. We are of the opinion that it was their intention to make a new law so far as the present law differed from the former, and that the new law embracing all that was intended to be preserved of the old, omitting what was not so intended, because complete in itself, and repealed all other law on the subject embraced within it. The authorities on this subject are clear and uniform."

See also **Columbia Wire Co. vs. Boyce,** 104 Fed. 172.

The rule as stated in America and English Enc. of Law, 2nd Ed. vol. 26, page 733, is as follows:

> "The general rule that where a statute, not merely cumulative of the common law or of previous statutes, and not made to cure the deficiencies thereof, is designed to create a new and independent system, and to dispose of the whole subject of legislation, it is the only law on that subject and without an express repealing clause displaces the old statutes, has been almost universally applied to codes and revisions, except so far as a contrary rule may be laid down by the revision itself. But a general revision of existing laws which are substantially re-enacted operates in a simultaneous repeal and re-enactment; that is, the new statutes are to be construed as a continuance and modification of the laws rather than as an abrogation of the old and a re-enactment of the new ones, and sometimes this is expressly declared by the revising statute."

See also:

Hampton vs. Hickey, 114 S. W. 707;

Davidson vs. Schmid, 124 S. W. 552;

State vs. McCafferty, 105 Pac. 992;

State ex rel Gaston vs. Shields, 130 S. W. 298.

These decision relate to the revision of several laws upon a single subject, as well as to the revision o fa system or the codification into a code of all the laws of the State. Applying this rule to the declaration made in

the first paragraph of the Act, "That from and after 60 days from the date of this Act the status of the lands allotted heretofore and hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows:" it seems to us beyond peradventure that the law as declared in this statute should be the sole and only law relating to or controlling the subject matter under consideration. In other words, the status should be as fixed by the law following the declaration and not by any other or preceding statute, unless specifically continued in force by the provisions of the Act itself.

The Act of May 27th, 1908, as a protection to the full-blooded allottee, substituted for the Secretary's approval the approval of the County Court of the County exercising jurisdiction over the administration of the estate, or in the case of the minor, exercising guardianship jurisdiction.

A new order of things had come to pass; the old court government in Indian Territory and the territorial government of the Territory of Oklahoma had passed away. In lieu thereof there had been established a State Government upon an equal footing with that of the other States of the Union. It was but meet and just that the probate jurisdiction in the State of Oklahoma should be exercised by the probate courts of the State of Oklahoma. This jurisdiction is in the exercise of the police power

reserved to the States and not conferred upon the Federal Government. Congress had no right to reserve this jurisdiction, to be exercised through the National courts or a department of the National Government, and did not undertake to do so.

We therefore agree with counsel for the Cherokee Nation and the United States that the effect of the Act of May 27th, 1908 was to repeal all of the Act of April 26th, 1906, which was not contained in the revision, but that part of the act of April 26th, 1906 imposing restrictions upon the right of the full blood allottees to alienate for a period of 25 years is carried forward into the revision. Even if there had been an unconditional repeal the question as to the constitutionality of said act imposing restrictions upon alienation by full blood allottees would not be a moot one.

The Court of Claims in its 16th finding uses the following language:

> "Since the passage of the Act of April 26th, 1906, **supra**, large numbers of such deeds, contracts to sell, and mortgages of their allotted lands, in violation of said last-mentioned act, are being filed almost daily in the offices of the recorders of deeds of the counties of Oklahoma, where the said lands are situated; and suits have been brought by the United States embracing 25,338 transactions in the United States courts of the State of Oklahoma to cancel said deeds, contracts, and mortgages upon the ground that they are a cloud upon the titles of such Indians to their allotments."

While, for the purpose of this suit, we presume the findings of the Court of Claims must be accepted as true, as a matter of fact, however, this is a gross exaggeration of the number of controversies arising under the provisions of the Act of April 26th, 1906. However, this may be, it is clear from this finding that a large number of conveyances were made after the approval of the Act of April 26th, 1906 and before the bringing of the suits referred to in 1908. The question of the validity of these conveyances made in the interim prevents, in any event, the operation of the repeal so as to constitute the question of the validity of said section 19 a moot one.

BRIEF OF WILLIAM W. HASTINGS, ESQ.

Mr. William W. Hastings has filed a brief in this cause purporting to be on behalf of the Cherokee Nation.

The brief does not disclose the authority he has to determine the policy of the Cherokee Nation in the matter involved, nor what authority the Cherokee Nation has to intervene in this suit or to act for its former members, who are now citizens of the United States and of the State of Oklahoma, and who receive no protection and who owe no allegiance to such nation.

The Government for which Mr. Hastings purports to file this brief and which insists upon the right to determine for its former members, who are citizens of the United States and of the State of Oklahoma, the right of whether they will assent to or controvert the constitutionality

of the acts involved, is described by the Commission to the FIVE CIVILIZED TRIBES, as quoted by this Court, in the case of **Stephens vs. The Cherokee Nation**, 174 U. S. 453, in the following language:

> "The Commission is compelled, by the evidence forced upon them during their examination into the administration of the so-called governments of this Territory, to report that these governments and all their branches are wholly corrupt, irresponsible and unworthy to be longer trusted with the care and control of the money and other property of Indian citizens, much less their lives, which they scarcely pretend to protect."

* * * The Cherokee National Government was one of the governments above referred to, and which is now seeking to perpetuate its authority, and to assert its qualification to act as guardian for full fledged citizens of the United States.

What property interest has the Cherokee Nation in the controversy? What interest of any character has it upon which it may assert the right to act for citzens of the United States and of the State of Oklahoma in reference to their individual matters?

It is stated in Mr Hastings' brief (p. 22) that William Brown sues as sole heir of the estate of a deceased son. William Brown sues on his own account as a Cherokee full blood, who is prohibited from alienating, or who is attempted to be prohibited (Section 19 Act of

April 26, 1906) from alienating his allotment, or the land inherited by him, as heir of his deceased son who died intestate.

We concur with counsel in the contention that Brown took only a life estate, but a life estate is property just the same as a fee simple and if the act is applicable to the inherited estate, it is void.

We again agree with Mr. Hastings, however, that the Act of May 27th, 1908, unquestionably repeals Section 22 of the Act of April 26th, 1906, by the substitution of a new and different procedure. This Court, however, has for consideration the determination in connection with this case, the validity of Section 22 in the case of **Marchie Tiger vs. Western Investment Company.**

It is further contended by Mr Hastings that it is the particular province of the State or the Legislative Department to act as "guardian and protector of those who are disabled to act for themselves." Conceding the truth of this contention for the purposes of this argument: how is the compentency of a citizen of the United States, over the age of twenty-one years to be determined The conferring of citizenship in the first instance determines competency, with the right to exercise all the privileges and immunities thereof. The legislative authority has no power to determine that the citizen who has been declared to be competent, is incompetent and to restrain him of his liberty or to interfere with the disposition of his property. This can

be done only upon judicial inquiry and upon the adjudging by a proper tribunal that such person is incompetent and the committing of his property to the custody of a proper guardian. The Legislature may not say that any individual, or class of individuals, is incompetnt and direct the appointment of a guardian. There is no more sacred right than that of liberty of person and to contract with reference to and disposition of property.

In Constitutional government this right can be taken only upon judicial inquiry and adjudication of incompetency.

Mr. Hastings suggests that in **Wiggins vs. Connolly, a prohibition against alienation by minors during minority was added after issuance of patent with the consent of the United States and the tribes, and was sustained.**

Our view of this case is presented in another part of the brief. We desire to say, however, that the right to alienate property by a minor is denied under the laws of every state or country, so far as we are advised. In fact it was for a long time a serious question whether a minor's property could be constitutionally sold under legislative authority by judicial proceedings, for the use and benefit of the minor. Therefore, in taking away the right of the minor to sell during minority, nothing was taken. The last act amounted to nothing more than the withdrawal of legislative authority to the guardian to make sale of the property of the minor upon order of court.

Mr Hastings, throughout his brief, fails to distinguish between tribal and individual property. This is particularly true in dealing with **Cherokee Nation vs. Hitchcock** and **Thomas vs. Gay** (pp. 34-47-53 of brief) and **Lonewolf vs. Hitchcock** (p. 35 of brief).

It is assumed throughout that the authority to deal with tribal property includes the authority to deal with individual property of the individual citizen of the United States.

THE BRIEF FOR THE UNITED STATES.

The body of this brief was prepared before we had an opportunity to inspect the brief filed on behalf of the United States. There are contentions made in said brief as to which we desire to offer some suggestions.

It is urged in support of the constitutionality of Section 19 of the Act of April 26th, 1906 (Brief p. 26) that "the full-blood Cherokee Indians 'are in the main in favor of the extension of the period of restrictions upon alienation of their lands and are in favor of the supervision of the Secretary of the Interior over the leasing of their lands and the sale of their inherited lands.' "

How was this fact ascertained? It is not even suggested that the provisions of the Act were ever submitted to the Cherokee people for their approval, or that any election was ever held in reference to any matter involved in the Act of April 26th, 1906.

It would be singular indeed if the Cherokee government which sought to intervene, and whose officials may perpetuate their own existence by such a result, supported by the numerous officials of the Department of the Interior, could not procure some evidence in some form that some part of the Cherokees were in favor of the law. Is the fact of approval by the Cherokee people material in determining the question of the constitutionality of said Act? Apparently, counsel for the United States and William W. Hastings, Esq. think so, for each urges the above quotation as a reason for sustaining the constitutionality of the Act. If it is material, then the Act must fall without a proper approval. If it is not material, it has no place in the argument. If it is material, the approval can be shown only in legal form and not by the opinion of some person interested in the subject-matter. What consideration would be given to the defense made to the provisions of an initiated bill or proposed constitutional amendment which relid upon the opinion that the majority of the people entitled to vote thereon were in favor of it? Since when has it become permissible to sutsain the constitutionality of an act violative of the Federal or State constitutions, by showing that a majority of some class of voters was, in the opinion of some witness, in favor of the provision?

THE ENABLING ACT.

A comparison is drawn between the Montana Enabling Act and the Oklahoma Enabling Act (Brief for U. S. p. 69), but there is a vital difference between them. Counsel for the United States seems to have fallen into the error (Brief p. 68) of quoting the clause in the Oklahoma Enabling Act relating to **public** lands

and comparing it with the provision of the Montana Act which relates to both Indian and public lands.

In Section 3 of the Oklahoma Enabling Act, the people of Oklahoma are required to disclaim any right, title and interest in and to any unappropriated **public** lands lying within the boundaries thereof, and to lands held by an **Indian tribe** or **nation**. The reservation of jurisdiction in the United States is limited to public lands, the provision being "that until the title to any such **public** land shall have been extinguished by the United States, same shall be and remain subject to the jurisdiction, disposal and control of the United States.

It is clear that it was the intetnion of Congress to draw a distinction between the right reserved over **public** lands and that over Indian lands. The reverse was true in the Montana Enabling Act.

In Conclusion.

Some mention is made in the opinion of the Court of Claims of the right of the government to annul a treaty whenever, in its judgment, the public welfare requires it. This may be true, insofar as it affects politcal relations. The government, however, dealt with the Five Civilized Tribes by grant. An absolute title passed by such grant executed by the principal chiefs and sanctioned and approved by the Federal government. This grant is no more subject to revocation or modification than would be the grant of an individual.

It is respectfully submitted, therefore, that section 19 is violative of the fifth amendment to the federal constitution and void; that section 22 does not extend restrictions upon alienation and is not obnoxious to the fedral constitution for that reason, but if it should be held to extend

restrictions it would be obnoxious to said amendment. That said section 19 should be adjudged for said reason to be void and of no force and effect.

Respectfully submitted,

S. T. BLEDSOE.

EVANS BROWNE.

APPENDICES.

Appendix A.

The Committee of Indian Affairs, to whom was referred the bill (H. R. 10701) to amend Section 6, Chapter 119, United States Statutes at Large No. 24, beg leave to report that they have had the same under consideration and recommend that it do pass without amendment.

The reasons for the pasage of this bill are fully set forth by the report of the Committee on Indian Affairs of the House of Representatives, which report is as follows, and is adopted as the report of your committee:

> "The Committee on Indian Affairs, to whom was referred the bill (H. R. 10701) to amend Section 6, Chapter 119, United States Statutes at Large No. 24, beg leave to submit the following report and recommend that said bill do pass without amendment.
>
> The statute proposed to be amended provided for granting citizenship to all Indians upon receipt by them of their allotments, but made an exception of the Five Civilized Tribes, who at the time, protested, on the ground that they were conducting governments of their own, which would be weakened by such a step. These governments are now completely changed and this reason has disappeared.
>
> Under the operation of the statute referred to the Indians in Oklahoma, such as the Pawnees, the Sac and Foxes, Pottawatomies, Kickapoos, the Cheyennes and Arapahoes, and in the Indian Territory, the Qua-

paws, the Senecas, the Wyandottes, the Ottawas, and the Shawnees and even the Modocs, have all been granted the valuable right of United States citizenship. None of these Indians are so highly advanced as the Five Civilized Tribes, and none so well prepared to enjoy United States citizenship.

The independent self-government of the Five Civilized Tribes has practically ceased. The policy of the government to abolish classes in Indian Territory and make a homogeneous population is being rapidly carried out. To enable the Indians of Indian Territory to properly protect their rights they should be given the right of United States citizenship immedlaiety. They should at once be put upon a level and equal footing with the great population with whom they are now intermingled.

There are about 70,000 Indians in Indian Territory, many of whom are already United States citizens. It is doubtful whether, under the statutes, these Indians can perform any of th eusual personal business engagements which are taking place daily on a vast scale in Indian Territory without a technical violation of the laws requiring supervision of the Indian people. It is true that these laws are regarded by the people of Indian Territory as not applicable to them. But all questions with regard to this matter should be eliminated by giving to them legal rights equal with other men.

By the terms of the act 'For the protection of the people of the Indian Territory, and for other purposes,' the members of the Five Civilized Tribes are authorized to bring

suits in the United States Courts to recover possession of property, they are permitted to vote, and under existing laws they act on juries.

This bill simply extends to the members of the Five Civilized Tribes the same privileges that are enjoyed by other Indians to whom allotments have been made."

Appendix B.

The act of May 8, 1906, passed the House of Representatives on March 9, 1906. As reported by the Committee, the bill did not have the proviso, "Provided further, that until the issuance of fee simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States." (Congressional Record, Vol. 40, Part 4, page 3598.)

After a discussion of the various provisions of the bill, Mr. Curtis states: "So far as the Indian Territory is concerned, all the Indians have been made citizens of the United States, and they are citizens now. The allotments have all been made to the Seminoles; nearly all to the Creeks. They are being made to the Chickasaws, the Choctaws and Cherokees."

Mr. Finley: How many Indians in the Indian Territory have received their allotments?

Mr. Curtis: That would be very hard to say. There are about 4,000 allotments yet to be made to the Choctaws and Chickasaws, but the patents have not been delivered to those who have been allotted in those two tribes. Nearly 7,000 patents have been delivered to the members of the

Cherokee tribe; nearly all patents have been delivered to members of the Creek tribe, and allotments are complete among the Seminole tribe.

Mr. Finley: Would not the passage of this bill have the effect of delaying it?

Mr. Curtis: It would not have that effect in the Indian Territory, because they were not included in the act of 1887; and the government has made special agreements with the Five Tribes in the Indian Territory and this law would in no way affect them.

Mr. Finley: I understand the gentleman from South Dakota to say a moment ago it would apply to the Indians in the Indian Territory.

Mr. Burke, of South Dakota: I stated I did not know, and I yielded to the gentleman from Kansas, who did.

Mr. Curtis: This law never applied to the Indian Territory.

Mr. Finley: Then, I understand, it does not apply to the Indians in the Indian Territory.

Mr. Burke: It seems not.

Mr. Keifer: I wish to ask the gentleman a question or two.

Mr. Burke: I yield to the gentleman.

Mr. Keifer: I want to know what there is in the bill that he has prepared that excludes it from general operation upon the Indian tribes in the Indian Territory.

Mr. Burke: The gentleman from Kansas has just explained, I thought, that particular point.

Mr. Keifer: A general law is likely to apply generally. Is there any reservation in this bill?

Mr. Curtis: Not in this bill; this is simply an amendment of Section 6 of the act of 1887. The act of 1887 excludes the Indians of the Indian Territory. Now, there is nothing in this bill bringing them within its terms. Therefore, the two acts would be construed together, and under the rules of law it would be held that the original act not applying to the Indians in the Indian Territory, this act amending it would not apply to them. Now, we have special agreements with the Five Tribes, under which allotments are being made to them. We have a bill pending, which will go to conference within a day or two, providing for final settlement of all of their affairs. We have special provisions in the various agreements in regard to the sale of intoxicating liquors, which have not been put in other agreements with Indians in the United States, and they have always been dealt with separately and distinctly. The agreements provide the conditions under which the patents shall be issued, which shall be subject to alienation and when they may be alienated; that homesteads shall not be disposed of for certain periods. As this bill only affects Indians with whom agreements are hereafter to be made, it cannot under any circumstances apply to the members of the Five Civilized Tribes.

. . . . . .

Mr. Burke, of South Dakota: Let me state to the gentleman from Ohio that we have this proviso on the bill: "Provided, further, that after issuance of fee simple patents, all allottees to whom trust patents shall hereafter be issued, shall be subject to the exclusive jurisdiction of the United States." Now, we certainly cannot legislate to change the status of any citizen whose status has been fixed and the Supreme

Court in the Heff case state that we have not that right without consent of the citizen to be affected and the consent of the state within which he resides.

Mr. Keifer: I have no objection to that statement, but it does not cover the objection; it applies only to conditions already fixed; but there are cases that are to come, of applications to be made, allotments to be made in the future, and this may embarrass conditions existing in the Indian Territory; and no matter whether there is a reservation in the act of 1887 or not, there is no reservation in this, and that is what I suggest —that the gentleman put in such a reservation. I am not opposing the bill.

Mr. Curtis: Very few words would cover it, simply providing that the provisions of this act should not extend to the Indians in the Indian Territory.

Mr. Keifer: I suggest that it had better be put so as to avoid any confusion.

. . . . . .

Mr. Curtis: Mr. Speaker, I suggest the following amendment: "Provided, further, that the provisions of this act shall not extend to the Five Civilized Tribes."

Mr. Lacey: In the Indian Territory?

Mr. Curtis: In the Indian Territory.

. . . . . .

Mr. Steenerson: I understand the object of this bill is to apply to those Indians who hereafter, after the passage of the proposed act, shall be allotted lands in severalty.

. . . . . .

Mr. Keifer: Mr. Speaker, the amendment offered by the gentleman from Kansas (Mr. Curtis), I think, has not been reported.

Mr. Speaker: The Clerk will report the amendment.

The Clerk wrote as follows:

"Add on the end of the bill the following:

"And provided further, that the provisions of this act shall not extend to the Five Civilized Tribes."

Mr. Speaker: The question is on agreeing to the amendment.

The question was taken and the amendments were agreed to.

Appendix C.

From Congressional Record, Vol. 33, Part 8, page 6760, under date of June 5, 1900. Title "Indian Allotments:"

Mr. Speaker: Does the gentleman from Wisconsin object to the calling up of the bill by the gentleman from Kansas?

Mr. Cooper: No, Mr. Speaker, I withdraw that objection.

Mr. Curtis: Mr. Speaker, I ask the unanimous consent for the present consideration of the bill (H. R. 10701) to amend Section 6, Chapter 119, United States Statutes at Large, numbered 24.

The clerk read the bill, as follows:

"Be it enacted, etc., that section six of chapter one hundred nineteen of the United States Statutes at Large, numbered 24, page three hundred and ninety, is hereby amended as follows, to-wit: 'After the words "civilized life" in line thirteen of said section six insert the words "and every Indian in the Indian Territory." ' "

Speaker: Is there objection?

Mr. Steele: I ask for an explanation.

Mr. Curtis: Under the act of 1896 allotments

are made to an Indian who becomes a citizen of the United States.

Mr. Lentz: Mr. Speaker, I ask for order, as I want to hear this explanation myself.

Speaker: The House will be in order and gentlemen will take their seats and cease conversation.

Mr. Curtis: Mr. Speaker, the act of 1887, known as the Dawes Allotment Act, provided that when allotments are made to Indians they shall become citizens of the United States. The statute, however, was not made applicable to the members of the Five Civilized Tribes in the Indian Territory, because they had governments of their own, elected officers and owned their own property in common. But since that time agreements have been made with the said Five Tribes. Their tribal governments are to be broken up; provisions have been made for them to take their lands in severalty. The allotments are being made, or will soon be made; they have been given the right to vote in certain elections; they serve on juries; they have the right to bring law suits, etc. The Committee thought it proper therefore to extend over the members of the Five Civilized Tribes the provisions of the act of 1887.

Mr. Snodgrass: Does that make them citizens?

Mr. Curtis: It does.

Mr. Snodgrass: Under the existing treaties between the United States and those Five Tribes have we the right to abolish their tribal government?

Mr. Curtis: They have agreed to it. Agreements with them have been negotiated through the Dawes Commission and three of those agree-

ments have been ratified by Congress and the remaining two agreements passed the House a day or two ago.

Mr. Snodgrass: Already?

Mr. Curtis: Already; and allotments will soon be made to the members of some of the tribes. Work preparatory to allotment is now going on.

There being no objection, the House proceeded to the consideration of the bill; which was ordered to be engrossed and was accordingly read the third time and passed.

On motion of Mr. Curtis, motion to reconsider the last vote was laid on the table.

For a discussion of the reasons for the extension of tribal government see Congressional Record, date of February 28, 1906, Vol. 40, Part 4, page 3120.

Attention is called to the following discussion between Senators McCumber and Long, touching the provisions of the act of April 26, 1906, extending tribal existence:

Mr. Long: There are provisions in the bill now pending for the continuance of tribal relations, for making a definite and complete roll of each tribe which shall govern in the distribution of tribal property.

Mr. McCumber: Yes, but that would not continue the government; that is simply continuing the persons who before had something to do with the government in certain positions for the purpose of carrying out some new provision. It is creating a certain office, if I may say, that is purely a federal office and for the purpose of signing papers.

Mr. Long: The Senator has reference to the government.

Mr. Bailey: If the Senator will permit me, the whole purpose of that is to insure the proper distribution of the property.

Mr. McCumber: Nothing more.

Mr. Bailey: That is all. The tribal relations there are practically destroyed today. The Indians are on their separate allotments, to which they either already have a deed, or to which they are now entitled to receive a deed. They have no longer any tribal court; they still have a tribal government, but after the 4th day of March they resort to the courts of the United States to assert their rights or to protect their rights. Therefore, there is nothing but what the Senator from Kansas (Mr. Long) himself described yesterday as a shell of a government there.

Mr. Long: That is all.

Mr. Bailey: Now, I want to state to the Senator the purpose I have in this, and I make no concealment of it. I am trying to prevent the railroad from obtaining that land.

Mr. McCumber: I think we all agree with the Senator on that.

After concluding the discussion of a possibility of the railroad grant attaching, in the House on consideration of this resolution, Congressional Record, Vol. 40, page 3222, Mr. Curtis concludes as follows:

> "While, in my judgment, this legislation is not at all necessary, because I do not believe that the grant to the railroad attaches, or can attach, yet, in view of the fact that the question has been raised by able lawyers at the other end of the capitol, I think it safe to pass this resolution."